In the Name of Allah, the Entirely Merciful, the Especially Merciful

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Publisher

Sulaiman A. Almaiman

Translator's Preface

This book is an English translation of sheikh professor Sâlih Al-Fawzân's الملخص الفقهي *A Summary of Islamic Jurisprudence*: Dâr Al-`Âsimah, 2001 (ISBN:3967/21). Our main aim in providing the English translation is propagating the true Da`wah that derives from Allah's Book and His Messenger's Sunnah. This is a duty that every Muslim should cherish. Allah says: ***"And let there be [arising] from you a nation inviting to [all that is] good, enjoining what is right and forbidding what is wrong, and those will be the successful."*** (Âlu `Imrân: 104). With this in mind, this translated work is, then, a humble response to our realization of a great responsibility to give the English speaking reader access to rich Islamic Jurisprudence Literature that simply focuses on the rules of jurisprudence and their proofs from the Qur'ân, Sunnah and the practice of the Righteous Salaf in addition to the opinions of the scholars of jurisprudence on controversial issues as well as the proofs they quote in support of their opinions. In doing so, we have left no stone unturned to make sure that the final copy of a translated book meets a specific high quality standard that would convey the same meaning intended by the author and expressed in the original source text. In effect, we have tried to set a balance between the originality of thought and the nature of the style of language.

To attain this aim, our work (in this book and others) exhibits certain distinctive features, namely, the process of translation, the style, the attention paid to the sociolinguistic aspects (i.e., transliteration, glossary and endnotes). We touch upon these features in the following section.

1.PROCESS

Before reaching the publisher, our work goes through a developmental process to guarantee that the final version of the translated book is as perfect as can be.

In effect, this process commenc.es with the first-hand translation, which is done by some very carefully chosen translators who are native-speakers of Arabic and have a native-like command of the target language. The main principle that governs the translation process is that the translator is after integrity. With integrity as the main target, the translators would not be tempted to impose their own ideas on the text nor would they gloss over the difficult paragraphs instead of taking the trouble to find out what is really meant. Translators would do their best to convey both the content and spirit of the original.

The next step of the process is undertaken by a reviser who has a high profile in translating religious texts and is aware of the traps that one might fall into. In addition, he has a thorough religious background knowledge that enables him to detect any unintended error in conveying the meaning.

The revised version is then submitted to a picky editor who is well-versed in the target language and has substantial knowledge of Islamic Sciences.

Finally, the edited version is handed over to a native-speaker of English who is knowledgeable in Islamic Sciences to make sure that the translation is readable and meaningful to the target audience.

2.STYLE

A natural outgrowth of the processes adopted in translation is the style the final version has come out in. The intended meaning of the author has been conveyed in a style that is authentic and as close to the original as possible. It really sounds authentic: So natural that the work does not read like a translation, but an indigenous piece of writing. The translation version is marked by remarkable variety and richness as well as tremendous skill at writing within formal religious genre. Moreover, attempts have been made to have it simple, clear and appealing to the target audience.

3.ATTENTION TO SOCIOLINGUISTIC ASPECTS

As a way to fill up the gap caused by sociolinguistic differences between the two languages (source language and target language), our work includes some additional features (i.e., transliteration, glossary and endnotes) that would guarantee better understanding of the concepts and ideas that might confuse the English speaking reader due to the lack of schemata in this field.

A- TRANSLITERATION SYSTEM

In the process of translation, we made a serious attempt to limit the use of transliterated Arabic terms (see table in p. X) to the following two situations:

i) There is no English expression that can reflect the same meaning as the original term.

ii) The Arabic term is of such importance that it is essential to familiarize the reader with it.

B-GLOSSARY

At the end of the book, we have included a glossary defining common Arabic terms that fulfill the above criteria. Included in the glossary also are terms that need further explanation.

C-ENDNOTES

In the endnotes, we have given clear and concise explanations of the terms that are not clear or understandable to the target reader due to the sociolinguistic differences in addition to the commentaries written by the author himself. Furthermore, each *hadîth* mentioned in the text of the book is ascribed in the endnotes to the book it is quoted from.

D-INDICES

To facilitate the process of going through the book and save the reader's time, we have included two indices, namely, subject index and name index. So, if the reader is looking for specific information or a given name, s/he would go directly to the index to find the page number.

4. QUR'ÂN TRANSLATION

The Qur'ân is Allah's exact words. These words can never ever be exactly translated into other languages because of, among other things, possible misinterpretations and limited human understanding. What is followed in the book is to translate the meanings as understood by Muslim scholars. We solely depended on the '***Translation of the Meaning of the Qur'ân***', translated by Saheeh International – Riyadh and published by Abulqasim Publishing House. When a verse is cited, the English interpretation is given between quotation marks "...." in indented, bold, and italicized format. The location of the Qur'anic verse, the name of the sura is given below to the verse as it is illustrated in the example below:

> ***"And We sent not before you any messenger except that We revealed to him that there is no deity except Me, so worship Me."***
>
> (Al-Anbyâ': 25)

5. *HADÎTH* TRANSLATION

Similarly, when we cite a *hadîth*, we mention the book of *hadîth* it is quoted from in addition to its number in the book. Further, the translation of Prophetic *hadîth* is represented in an indented format, italicized and between quotation marks "..." as it is illustrated in the example below:

> *"Do not drink in gold or silver vessels nor eat in similar bowls (i.e. bowls made of gold or silver), for they belong to them (the disbelievers) in this world and to us in the Hereafter."*

PART 2

INTRODUCTION

All praise be to Allah, the Lord of the Worlds, and peace be upon our Prophet Muhammad, the Seal of prophets, and upon his household, his Companions, and whoever follows their example with good conduct until the Day of Recompense.

To commence, this is a brief account of juristic issues, in which views are provided with proofs from the *Sunnah* (Prophetic Tradition) and the Qur'ân. I have previously delivered the content of this book in the form of sermons broadcast on radio, and I have been repeatedly asked by the audience to redeliver them, and to publish them as a treatise, for the sake of continuous benefit, if Allah wills. In fact, I never intended this book to be published when it was under preparation, but in response to the wish of many people, I reviewed it, arranged its contents, and presented it to be published. And here it is now, gentle reader, between your hands; whatever correctness and benefit you find therein are out of the Grace of Allah, Alone, and whatever mistakes you find are mine, and I seek the forgiveness of Allah for them.

This treatise is an abstract of a book entitled *Ar-Rawdul-Murbi' fî Sharh Zâdul-Mustaqni'* including its footnotes, written by Sheikh 'Abdur-Rahmân Ibn Muhammad Ibn Qâsim (may Allah have mercy on him), bearing in mind that I added some remarks, when necessary.

I ask Allah, Glorified and Exalted be He, to guide us all to useful knowledge and righteous deeds. May Allah confer peace and blessings upon our Prophet Muhammad, his household, and his Companions.

The Virtues of Understanding Religion

All praise be to Allah, Lord of the Worlds, and peace be upon our Prophet Muhammad, and upon his household, his Companions, and whoever follows their example with good conduct until the Day of Recompense.

To commence, understanding the religion is considered one of the best deeds, and a sign of goodness. The Prophet (PBUH) says:

> *"If Allah wants to do good for a person, He makes him understand the religion."*[1]

This is because comprehending the religion leads to useful knowledge upon which righteous deeds depend. Allah, Exalted be He, says:

> ***"It is He Who has sent His Messenger with guidance and the religion of truth..."*** (Qur'ân: Al-Fath: 28)

"Guidance" here refers to useful knowledge, and "the religion of truth" is that which leads to righteous deeds. Besides, Allah commanded the Prophet (PBUH) to invoke him for more knowledge; Allah, Exalted be He, said:

> ***"... And say, 'My Lord, increase me in knowledge.' "***
>
> (Qur'ân: Tâhâ: 114)

Al-Hâfiz Ibn Hajar comments that the aforesaid Qur'anic verse, ***"...And say, 'My Lord, increase me in knowledge,' "*** is a clear indication of the merit and excellence of knowledge, for Allah never commanded His Prophet (PBUH) to invoke Him for more of anything other than knowledge[2]. The Prophet (PBUH) used to refer to the assemblies wherein useful knowledge is taught as *"The Gardens of Paradise,"* and he (PBUH) stated that *"Men of knowledge are the inheritors of prophets."*

There is no doubt that before one starts doing something one should know how to perform it in the best way, so as to perform it well to harvest its desired fruits. Likewise, it is by no means reasonable that one starts worshipping one's Lord – the way through which one's salvation from Hellfire and admittance to Paradise are gained – without having due knowledge.

As such, people are divided into three categories regarding knowledge and deeds:

The first category is represented in those who combine useful knowledge along with righteous deeds. Those are the ones whom Allah has guided to the straight path; the path of those upon whom Allah has bestowed favor of the prophets, the steadfast affirmers of truth, the martyrs and the righteous, and excellent indeed are these as companions.

The second category is represented in those who learn useful knowledge but do not act accordingly. Those are the ones who have evoked Allah's anger, like the Jews and whoever follows their footsteps.

The third category is represented in those who act without having knowledge. Those are the ones who are astray, namely the Christians and their likes.

These three categories are mentioned in the Sura of *Al-Fâti<u>h</u>ah (the Opening Chapter of the Qur'ân)*, which we recite in every *rak'ah* (unit of prayer) of our prayers:

> ***"Guide us to the straight path – the path of those upon whom You have bestowed favor, not of those who have evoked [Your] anger or of those who are astray."*** (Qur'ân: Al-Fâti<u>h</u>ah: 6-7)

In his interpretation of the aforesaid verses of the Sura of *Al-Fâti<u>h</u>ah*, **Sheikh Mu<u>h</u>ammad Ibn 'Abdul-Wahhâb** (may Allah have mercy on him) has stated:

> *"The scholars meant in the verse that reads, '**those who have evoked (Allah's) anger**' are those who do not act in accordance with their knowledge, and '**...those who are astray**' are the ones who act without knowledge. The former is the quality of the Jews, while the latter is that of the Christians. Some ignorant people mistakenly believe that those two qualities are restricted to the Jews and the Christians, forgetting that Allah commands them to recite the above-mentioned Qur'ânic invocation seeking refuge with Him from being one of the*

people of these two qualities. Glory be to Allah! How do those ignorant people think that they are safe from these qualities, though they are taught and commanded by Allah to keep on invoking Him (through the aforesaid verses) seeking His refuge against them?! Are they not aware that they thus assume evil about Allah?!"[3]

This shows the wisdom behind the obligation of reciting this great Sura (i.e., *Al-Fâtihah*) in every *rak'ah* of our prayers (whether obligatory or supererogatory). It is because this sura contains many great secrets, among them is the great Qur'anic invocation that reads, ***"Guide us to the straight path – the path of those upon whom You have bestowed favor, not of those who have evoked [Your] anger or of those who are astray."*** (Qur'ân: Al-Fâtihah: 6-7) Through this invocation, we ask Allah to guide us to follow the conduct and the way of the people who have useful knowledge and perform righteous deeds, which is the way to salvation in both this world and the Hereafter. We also invoke Him to safeguard us from the pathway of the ones astray, who have neglected either the righteous deeds or the useful knowledge.

Thus, we could argue that useful knowledge is that derived from the Qur'ân and the *Sunnah* (Prophetic Tradition). It is gained by means of deep understanding and comprehension of both, which can be achieved through the help of religious instructors or scholars. This can also be achieved through the books of exegesis of the Qur'ân and those of *Hadîth*, as well as the books of jurisprudence and those of Arabic grammar – the language in which the Qur'ân has been revealed. Such books are the best means of comprehending the Qur'ân and the *Sunnah*.

So as to perform the acts of worship so perfectly, you should, dear Muslim brother, learn what leads to the perfection of your performance of these various acts of worship, such as Prayer, Fasting and *Hajj* (Pilgrimage). You should also be aware of the rulings on *Zakâh*[4] as well as the rulings on the dealings that concern you, so as to make use of what Allah has made lawful for you and avoid what He has made unlawful. You should observe this to ensure that the money you earn and the food you eat are lawfully obtained, in order to be one of those whose supplications are granted by Allah. In fact, you have to know about all these matters, and this could be easily achieved, Allah willing, provided that you have resolute determination and sincere intention. So, be keen on reading useful relevant books, and keep in touch with religious scholars to ask them about whatever ruling you are in doubt about and to be acquainted with the rulings of your religion.

In addition, you should take an interest in attending religious symposiums and lectures delivered at mosques and the like, listening to the broadcast religious programs, and reading religious magazines and publications. If you concern yourself with such good activities, your religious knowledge will increase, and your insight will be enlightened.

Also, do not forget, dear brother, that knowledge increases and grows when it is practically applied. Thus, if your deeds are according to your knowledge, Allah surely will increase your knowledge. This corresponds with the maxim stating, "He whose deeds are done in accordance with his knowledge, Allah will bestow upon him the knowledge of that which he has no knowledge about." This is confirmed by the Glorious Qur'anic verse that reads:

> ***"... And fear Allah. And Allah teaches you. And Allah is Knowing of all things."*** (Qur'ân: Al-Baqarah: 282)

In fact, the worthiest thing to spend your time on is seeking knowledge, for which the people of good judgment compete. It is through knowledge that hearts maintain living and deeds are purified.

Allah, Exalted be His Words and Glorified be His Attributes, praises the scholars who act in accordance with their knowledge, and states their elevated degrees, as He mentions in His Glorious Book, the Qur'ân:

> ***"... Say, 'Are those who know equal to those who do not know?' Only they will remember [who are] people of understanding."***
> (Qur'ân: Az-Zumar: 9)

Allah, Exalted be He, also says:

> ***"... Allah will raise those who have believed among you and those who were given knowledge, by degrees. And Allah is Acquainted with what you do."*** (Qur'ân: Al-Mujâdilah: 11)

So, Allah, Glorified and Exalted be He, shows the merit of those given knowledge along with faith, and tells us that He is Acquainted with and Aware of what we do. Thus, Allah shows us the necessity of combining both knowledge and righteous deeds, and tells us that both have to be out of one's sincere faith and fear of Him, Glorified be He.

In accordance with the Qur'anic duty of cooperating in righteousness and piety, we will – if Allah wills – provide you, gentle reader, through this book with some information of the juristic inheritance which our scholars

extracted and wrote down in their books. We will provide you with what can be easily understood, so that it can benefit you and help you in gaining more useful knowledge.

Finally, we invoke Allah to bestow useful knowledge upon all of us, and to guide us to the righteous deeds. We also invoke Him, Glorified and Exalted be He, to make us see the truth as it really is, and guide us to follow it, and to see falsehood as it really is, and grant us the ability to avoid it, He is Hearing and Responsive.

Endnotes

1 Al-Bukhâri (71), Muslim (2386).
2 See *Fathul-Bâri* (1/187)
3 See Ibn Ghannâm's *Târîkh Najd*.
4 *Zakâh* is an annual expenditure for the benefit of the Muslim community, primarily to help the poor, required from those Muslims who have excess wealth. Paying *Zakâh* is one of the five main pillars of Islam (for more elaboration, refer to the chapter on *Zakâh*).

I:TRADE TRANSACTIONS

CHAPTER

1

Trade Transactions

Allah, in His Noble Book, the Qur'ân, and the Prophet (PBUH) through his honorable *Sunnah* (Prophetic Tradition), pointed out the rulings on transactions because of people's need for them; people in general need food, clothes, houses, vehicles and other necessities of life in addition to different luxuries which are obtained through trade.

Trade is permissible according to the Qur'ân, *Sunnah*, consensus of Muslim scholars, and analogical deduction.

Allah says:

> "*...but Allah has permitted trade...*" (Qur'ân: Al-Baqarah: 275)

And:

> "*There is no blame upon you for seeking bounty from your Lord (during Hajj)...*" (Qur'ân: Al-Baqarah: 198)

The Prophet (PBUH) said:

> *"The seller and the buyer have the right to keep or return goods as long as they have not parted. If both parties speak the truth and point out the defects and qualities (of the goods), then they will be blessed in their transaction. But if they tell lies or hide something, then the blessings of their transaction will be destroyed."*[1]

Muslim scholars uniformly agree on the permissibility of trade in general.

Concerning analogical deduction, trade transactions are permissible because people's needs are interdependent, and people grant nothing for nothing. A person does not give what he has, money or goods, in return for nothing, so wisdom necessitates the permissibility of trade in order to enable people to get their needs.

Trade transactions can be validated by means of a verbal formula or an actual one. The verbal formula expresses the seller's verbal agreement on the sale when he, for example, says to the buyer, "Well, I sell it to you" and the buyer's verbal acceptance when he, for example, says, "And I buy it". The actual formula is the act of exchange itself, when the seller is given the usual price and the buyer takes the commodity, without any verbal declaration.

Sometimes a trade transaction is validated by means of both verbal and actual formulas. **Shaykhul-Islâm Taqiyyud-Dîn** (may Allah have mercy on him) said:

> *"There are some ways of exchange. First, when the seller gives only a verbal acceptance and the buyer takes the commodity (without declaring his acceptance). For example, a seller may say to the buyer, 'Take this piece of cloth for a dinar,'*[2] *and the buyer takes it (without saying a word). The same ruling applies when the price is a given material; for example, the seller may say to the buyer, 'Take this piece of cloth for yours' and then the buyer takes it. Second, when the buyer declares his acceptance and the seller only gives him the commodity whether the price is a given material or the sale is on credit (and the buyer is honestly guaranteed to pay). Third, when neither the seller nor the buyer speaks (about the price) for there is a custom to that effect."*[3]

There are certain conditions to be fulfilled (some related to the two parties while others to the commodity) to make a trade transaction valid, lacking any of which invalidates the transaction:

Conditions Related to the Seller and the Buyer

First: Mutual Consent: A trade transaction becomes invalid if either the seller or the buyer is unjustly forced to conclude it. Allah, Exalted be He, says:

"...but only [in lawful] business by mutual consent..."

(Qur'ân: An-Nisâ': 29)

Moreover, the Prophet (PBUH) said:

"Selling should be only by mutual consent."

(Related by Ibn Hibbân, Ibn Mâjah, and other compilers of *Hadîth*)[4]

However, a transaction concluded through just compulsion is deemed valid, as in the case when the ruler (or the one in authority) forces a bankrupt person to sell his remaining property in order to pay off his debts.

Second: Being free, having reached puberty, being legally accountable, and being sane: A trade transaction becomes invalid if either of the seller or the buyer is a minor, a foolish or weak-minded person, an insane person, or a slave who has not taken his master's permission (to conclude the transaction).

Third: Being the owner (of the commodity or the money) or a representative of the owner: The Prophet (PBUH) said to Hakîm Ibn Hizâm:

"Do not sell what you do not have (or possess)."

(Related by Ibn Mâjah and At-Tirmidhî who deems it a *sahîh* (authentic) *hadîth*)[5, 6]

Al-Wazîr said:

"Scholars agree that it is impermissible for a Muslim to sell whatever is not present with him or whatever he does not possess, and then goes out to buy that thing for his customer, for this is a void trade transaction."

Conditions Related to the Commodity

First: Being absolutely lawful to use: It is impermissible to sell whatever is prohibited for a Muslim to make use of, such as intoxicants, the flesh of swine, musical instruments, and dead animals. The Prophet (PBUH) said:

"Allah and His Messenger prohibited the trade of intoxicants, dead animals, pigs, and idols."

(Related by Al-Bukhârî and Muslim)[7]

He (PBUH) also said:

"Allah prohibited intoxicants and their (gained) prices, dead animals and their prices, and pigs and their prices."

(Related by Abû Dâwûd)[8]

It is also illegal to sell the impure fats (or the ones affected by impurity) for the Prophet (PBUH) said:

"When Allah prohibits something, He prohibits the price paid for it."[9]

Also, Al-Bukhârî and Muslim related that the Prophet (PBUH) was asked:

"O Allah's Messenger! What about the fat of dead animals, for it is used for greasing the boats and the hides, and people use it (as oil) for lamps?" He (PBUH) replied, 'No, it is prohibited.' "

Second: The price and the commodity must be available, (when the trade transaction is concluded), for any unavailable commodity is considered nonexistent and is illegal to be sold. For example, it is illegal to sell a fugitive slave, a runaway camel, or a bird in the air. Likewise, it is illegal for a Muslim to sell something taken by force except in the presence of the one who took it forcefully, or one who is able to restore it (such as the police or a judge or the like, to guarantee delivering it to the buyer).

Third: The price and the commodity must be known to the seller and buyer, for hiding any is regarded as fraud which is prohibited in Islam. Thereupon, it is invalid for the buyer to buy something he does not see or recognize, and for the seller to sell an animal embryo in its mother's womb or milk in udders, separately. Also, the selling systems called *mulâmasah*[10] and *munâbadhah*[11] are prohibited. Abû Hurayrah (may Allah be pleased with him) narrated:

"The Messenger of Allah (PBUH) forbade selling by mulâmasah and munâbadhah."

(Related by Al-Bukhârî and Muslim)[12]

Selling by *hasâh* (stone), likewise, is prohibited; it is another type of sale which means that when the buyer throws a stone at a certain commodity displayed for sale, he has to buy it at the price decided by the seller.

Endnotes

1 Al-Bukhârî (2079) [4/391] and Muslim (3836) [5/416].
2 Dinar: An old Arab coin that equals 4.25 grams of gold.
3 See: *'Majmû 'ul-Fatâwâ'* [29/7-8].
4 Ibn Mâjah (2185) [3/29] and Ibn Hibbân (4967) [11/340].
5 *Sahih* (authentic) *hadith* is a *hadith* whose chain of transmission has been transmitted by truly pious persons who have been known for their uprightness and exactitude; such a *hadith* is free from eccentricity and blemish.
6 Abû Dâwûd (3505) [3/495], At-Tirmidhi (1235) [3/534], An-Nasâ'i (4627) [4/334] and Ibn Mâjah (2187) [3/30].
7 Al-Bukhârî (2236) [4/535] and Muslim (4024) [6/8].
8 Abû Dâwûd (3485) [3/487].
9 Abû Dâwûd (3488) [3/488].
10 *Mulâmasah*: A way of selling used to be practiced before Islam; it means that when the buyer touches something displayed for sale, he has to buy it at the price decided by the seller.
11 *Munâbadhah*: A way of selling used to be practiced before Islam; it means that when the buyer throws something to the seller, the buyer has to buy it at the price decided by the seller.
12 Al-Bukhârî (2146) [4/453] and Muslim (3780) [5/393].

CHAPTER

2

Prohibited Trade Transactions

Allah has made trade permissible for His servants as long as it does not cause them to miss what is more useful and much important, such as an obligatory act of worship. Trade is also permissible so long as it does not cause any harm to others.

It is impermissible for a Muslim upon whom the *Jumu`ah* (Friday) Prayer is obligatory to buy or sell after its second prayer call (*adhân*), for Allah, Exalted be He, says:

> ***"O you who have believed, when [the adhân] is called for the prayer on the day of Jumu`ah [Friday], then proceed to the remembrance of Allah and leave trade. That is better for you, if you only knew."*** (Qur'ân: Al-Jumu`ah; 9)

Thus Allah, Glorified and Exalted be He, has prohibited trade when the prayer call for the *Jumu`ah* (Friday) Prayer is declared lest Muslims should be too busy with trade to attend the Prayer. Allah has mentioned trade in particular

as it is one of the most important worldly activities that occupy people's times, as most people earn their living through trade. This Divine prohibition implies that trade is prohibited and invalid at such a time (when the *Jumu'ah* Prayer is due). Then Allah, Glorified and Exalted be He, says, ***"That"***, referring to leaving trade and attending the *Jumu'ah* Prayer, ***"is better for you"*** than being occupied with trade ***"if you only knew"*** your own good and interests. Likewise, it is prohibited for a Muslim to be occupied with any worldly activity, not only trade, at the due time of *Jumu'ah* Prayer.

It is impermissible for Muslims as well to let trade or any other worldly activity divert them from establishing obligatory prayers after hearing the prayer call. Allah, Exalted be He, says:

> ***"[Such niches are] in houses [i.e. mosques] which Allah has ordered to be raised and that His Name be mentioned [i.e. praised] therein; exalting Him within them in the morning and the evenings. [Are] men whom neither commerce nor sale distracts from the remembrance of Allah and performance of prayer and giving of Zakâh[1]. They fear a Day in which the hearts and eyes will [fearfully] turn about - that Allah may reward them [according to] the best of what they did and increase them from His bounty. And Allah gives provision to whom He wills without account [i.e. limit]."*** (Qur'ân: An-Nûr: 36-38)

It is also illegal to sell anything which can be used for disobeying Allah and committing a sin. To illustrate, it is illegal to sell certain fruit juices to whoever uses them for making intoxicants, as it would be cooperation in sinning. Allah, Exalted be He, says:

> ***"...but do not cooperate in sin and aggression..."***
>
> (Qur'ân: Al-Mâ'idah: 2)

This kind of sale is considered cooperation in aggression. Similarly, it is illegal to sell weapons, armaments, and munitions at the time of dissention among Muslims lest they might be used for killing Muslims; the Prophet (PBUH) prohibited Muslims to do so, and Allah, Exalted be He, says:

> ***"...but do not cooperate in sin and aggression..."***
>
> (Qur'ân: Al-Mâ'idah: 2)

In this connection, **Ibnul-Qayyim** said:

> *"All legal proofs demonstrate that the validity, legality and permissibility of a sale are also affected by intentions and usage. For example, one is prohibited from selling someone a weapon if one knows that he would*

use it for killing a Muslim, as this is considered cooperation in sin and aggression. However, if a Muslim sells a weapon to someone who fights in the Cause of Allah, it is considered (for the seller) a sign of obedience and devotion to Allah. On the other hand, it is impermissible to sell weapons to those who fight Muslims or those who use them for highway robbery, as it is regarded as cooperation in sin."[2]

Muslims are not permitted as well to cancel the sales of one another. For example, a Muslim seller may say to a customer who has paid ten pounds for an item from another seller, "I can sell you a similar piece for only nine pounds," or "I can sell you a better one for the same price." This is prohibited for the Prophet (PBUH) said:

"You must not try to cancel the sales of one another."

(Related by Al-Bukhârî and Muslim)[3]

The Prophet (PBUH) also said:

"A Muslim must not try to cancel the sales of his (Muslim) brother."

(Related by Al-Bukhârî and Muslim)[4]

Likewise, it is impermissible for Muslims to cancel the purchases of one another. For instance, a Muslim buyer may say to a seller who has sold another Muslim a commodity for nine pounds, "I can buy it for ten pounds," or the like. Nowadays, many a prohibited trade transaction like the aforementioned ones occurs in the markets of Muslims. So, a true Muslim must avoid such violations, forbid them, and show disapproval of those who commit them.

Among the prohibited trade transactions is that made by a town dweller on behalf of a desert dweller, for the Prophet (PBUH) said:

"A town dweller should not trade on behalf of a desert dweller."[5]

Ibn 'Abbâs, commenting on this hadîth, said, *"It means that he (a town dweller) should not act as his (a desert dweller's) broker."*[6]

The Prophet (PBUH) also said:

"Leave the people alone, Allah will give them provision from one another."[7]

Thus, a town dweller is prohibited to sell or buy on behalf of a desert dweller. In fact, what is prohibited is that a town dweller goes to a desert dweller and offers his service to buy or sell something on his behalf. Yet, it becomes

permissible only if the desert dweller is the one who comes to the town dweller asking him to buy or sell on his behalf.

Another type of prohibited trade is that called *`înah*, in which a seller sells a commodity on credit to a buyer and then buys it from him at the same time at a lower price. For example, a trader sells a car for twenty thousand pounds on credit then buys it from the same man (who has just bought it) for fifteen thousand pounds cash. Thus, the original buyer owes the seller twenty thousand pounds to be paid at the due time. This kind of selling is prohibited as it is mere fraud and one of the forms of *ribâ*[8]. In this way, the seller sells a sum of money on credit for another one in cash, making the commodity just a means of fraud. The Prophet (PBUH) said:

> *"If you sell to one another with `înah, hold the tails of cows (i.e. become occupied with worldly gains), become pleased with agriculture, and give up jihâd (fighting in the Cause of Allah), Allah will make disgrace prevail over you, and will not withdraw it until you return (i.e. adhere) to your religion."*[9]

He (PBUH) also said:

> *"There will come a time when people consider ribâ lawful by means of trade."*

Endnotes

1 *Zakâh* is an annual expenditure for the benefit of the Muslim community, primarily to help the poor, required from those Muslims who have excess wealth. Paying *Zakâh* is one of the five main pillars of Islam (for more elaboration, refer to the chapter on *Zakâh*).
2 See the footnote in Ibn Qâsim's book entitled *"Ar-Rawd Al-Murbi`"* [4/374].
3 Al-Bukhârî (2139) [4/446] and Muslim (3440) [5/200].
4 Al-Bukhârî (5142) [9/249] and Muslim (3441) [5/201].
5 Al-Bukhârî (2140) [4/446] and Muslim (3803) [5/202].
6 Al-Bukhârî (2158) [4/467] and Muslim (3804) [5/404].
7 Muslim (3805) [5/404].
8 *Ribâ*: A term that includes usury and usurious gain and interest.
9 Abû Dâwûd (3462) [3/477].

CHAPTER

3

Conditions of Trade Transactions

Recurrent are the conditions set by a seller or a buyer when concluding a trade transaction. Accordingly, it has become a necessity to study and tackle the different kinds of such conditions, pointing out the legal and the illegal ones among them. The *faqīhs*[1] (may Allah have mercy on them) defined a condition (of a trade transaction) as follows: *"It is obligating one of the two parties (of the sale) by the other for the benefit of the latter."* According to the *faqīhs*, a transactional condition is invalid unless it is made at the time of the transaction and embedded in the transactional contract. In other words, a condition is invalid if made before or after concluding the contract.

In general, the conditions in trade transactions are divided into valid conditions and invalid ones.

First: Valid Conditions

Valid conditions are those that do not contradict the objective of the contract. Such a kind of condition obligates its fulfillment; the Prophet (PBUH) said:

"Muslims must keep to the conditions they make."[2]

Such conditions obligate fulfillment also because all conditions in trade transactions are originally legal except for those invalidated and prohibited by the Lawgiver[3]. The valid conditions are of two kinds:

1- The first kind of valid conditions of trade transactions is that which ensures and consolidates the contract, and benefits the one who sets such conditions. Examples of such valid conditions are those made by the seller such as stipulating taking a security deposit or stipulating surety; this surely makes the seller free from worry. There are similar valid conditions in favor of the buyer, such as stipulating delaying the payment or part of it for a specified term, i.e. to pay it at a specific date. So long as the buyer is committed to this condition the sale is valid. A buyer may set a condition concerning a specification of the commodity, such as requiring a special brand or product, as people have different preferences. In such a case, the sale is legally valid as long as the commodity meets this condition; otherwise, the buyer has the right to cancel the contract or at least get a compensation for the missing stipulated quality. This compensation is estimated by comparing the value of the commodity meeting the required condition and the one lacking it, and then the difference between the two values can be paid to the buyer if he asks for that.

2- The second kind of valid transactional conditions is that in which one of the two parties stipulates benefiting lawfully from the commodity in a certain way. For example, a seller of a house may stipulate staying therein for a specific period, or a seller of a riding animal or a car may stipulate riding it to a certain place. Jâbir (may Allah be pleased with him) narrated:

   "The Prophet (PBUH) sold a camel and stipulated to ride it (and use it) until he reaches Medina."

   (Related by Al-Bukhârî and Muslim)[4]

   This *hadith* states the permissibility of selling an animal and stipulating riding it to a certain place; the same goes for similar transactional cases. Another example is when the buyer stipulates a specific work

to be done to the commodity, such as buying firewood stipulating that the seller should deliver it, or buying cloth making a condition that the seller should stitch it.

Second: Invalid Conditions

There are two kinds of invalid conditions:

1- The first kind is the invalid illegal condition that basically nullifies the selling contract, such as when one of the two parties stipulates another contract within the main one. For example, it is an illegal condition when a seller of a commodity makes a condition that the buyer must make him his partner in business, lend him a sum of money, or allow him to share his house, etc., or that he says, "I sell you this commodity on the condition that you rent me your home." Such a condition is legally invalid so it nullifies the original contract. This is because the Prophet (PBUH) forbade concluding a selling contract based on another conditional contract[5]. This Prophetic prohibition was interpreted by Imâm Ahmad Ibn Hanbal (may Allah have mercy on him) exactly as we have pointed out above.

2- The second type of invalid transactional conditions is the one which itself is null and void, yet it does not nullify the contract. For example, a buyer of a commodity may make a condition that he will give it back if he undergoes loss, or a seller of a commodity may make a condition that the buyer must not resell it. Such a type of conditions is legally invalid as it violates the principle of a business contract that absolutely allows the buyer to use the (purchased) commodity in whatever manner he likes. The Prophet (PBUH) said:

"If anyone imposes a condition which is not in the Book of Allah, then that condition is invalid even if he imposes one hundred conditions."

(Related by Al-Bukhârî and Muslim)[6]

The phrase "in the Book of Allah" in the aforementioned *hadith* refers to *Sharî'ah* (Islamic Law) including the Qur'ân and the *Sunnah*. Still, such an invalid type of conditions does not nullify the contract. To illustrate, in the well-known incident of Barîrah,[7] the one who sold her made a condition that her *walâ'*[8] would go to him if she was emancipated. However, the Prophet (PBUH) declared that the condition was null, yet he (PBUH) did not consider the contract to be invalid. Then, the Prophet (PBUH) said:

"Verily, the walâ' is for the emancipator."[9]

A Muslim involved in businesses, purchasing and selling, should learn the legal rulings on trade transactions as well as the valid and invalid conditions of any business deal to be aware of the legal situations in such dealings. Thus, Muslims can find legal solutions to their controversies resulting from trade transactions, most of which result from the ignorance of the seller, the buyer, or both, of such rulings, as well as the invalid conditions they set in transactions.

Endnotes

1 *Faqih*: A scholar of Islamic Jurisprudence.
2 Abû Dâwûd (3594) [4/16]. See also At-Tirmidhî (1352) [3/634].
3 The Lawgiver of Sharî'ah (Islamic Law) is Allah, Exalted be He; the term can also refer to the Prophet (PBUH) as he never ordained but what was revealed to him by Allah.
4 Al-Bukhârî (2718) [5/385] and (4074) [6/32].
5 At-Tirmidhî (1234) [3/533] and An-Nasâ'i (4646) [4/340].
6 Al-Bukhârî (2155) [4/467] and Muslim (3756) [5/380].
7 'Â'ishah's Muslim female slave.
8 *Walâ'*: The freed slave's loyalty by virtue of emancipation.
9 Al-Bukhârî (2155) [4/467] and Muslim (3756) [5/380].

CHAPTER

4

Option in Trade Transactions

Islam is a lenient and comprehensive religion that cares for Muslims' interests and mitigates difficulties to make things easy for them. This is evident in the legal rulings concerning trade transactions as Islam gives each of the seller and the buyer the choice to consider his own interest so that he can confirm what benefits him and cancels out what appears to be against his interest regarding the sale. Option in sales means seeking that which is better in either the conclusion or the voidance of the sale.

There are eight types of option in trade transactions:

First: Option during the Session

Both the seller and the buyer have the choice to confirm or cancel the deal as long as they have not separated from the place of the deal, for the Prophet (PBUH) said:

> *"Both the buyer and the seller have the option (of canceling or confirming the bargain) as long as they have not parted and are still together."*[1]

His Eminence scholar **Ibnul-Qayyim** (may Allah have mercy on him) said:

"The Lawgiver has ordained the option during the session while concluding trade transactions for the interests of the two parties to achieve full consent and satisfaction which Allah stipulates in transactions when He says, ***'...by mutual consent...'*** (Qur'ân: An-Nisâ':29) *Sometimes a contract is concluded without being reconsidered or reviewed. Therefore, the perfect Sharî'ah (Islamic Law) necessitates the existence of a session during which the two parties can reconsider the deal. Thus, according to the aforementioned hadith, both the seller and the buyer have the choice to confirm or cancel the deal as long as they have not separated from the place of the deal. However, if the two parties or one of them ignores this aspect of choice, the deal is still deemed valid once it is concluded. This choice is a right related to both the seller and the buyer, and each of them is allowed to ignore it '...as long as they have not parted and are still together, or one of them gives the other the option (of keeping or canceling the bargain),' as the Prophet (PBUH) said. However, it is prohibited for each of the two parties to hasten to leave the other in order to prevent him from reconsidering the deal. 'Amr Ibn Shu'ayb reported that the Prophet (PBUH) said, '...and it is not permissible for one of them to separate from the other for fear that the latter may demand that the bargain be rescinded.'"*[2,3]

Second: Option of Stipulation

The two parties can stipulate, during or after concluding the contract, that a certain period of option (to accept or reject the deal) is to be specified. If both of them agree to that, then they have the right of option whether to accept or reject the deal within the specified period. This is because the Prophet (PBUH) said:

"Muslims must keep to the conditions they make."[4]

Moreover, the validity of the option of stipulation is indicated in the general meaning of the following Qur'anic verse:

"O you who have believed, fulfill [all] contracts..."

(Qur'ân: Al-Mâ'idah: 1)

However, it is permissible for each of the two parties to make a special condition to serve his own interests even if the other does not make any, provided the other agrees. At any rate, option of stipulation is something that

concerns the seller and the buyer, and they are allowed to use it in the way they like provided there is mutual consent.

Third: Option in Case of Deception

If the buyer or the seller is gravely deceived due to misjudgment of the sale, he is permitted to confirm or cancel the deal. The Prophet (PBUH) said:

> *"One should not harm others nor should one seek benefit for oneself by causing harm to others."*[5]

He (PBUH) also said:

> *"The property of a Muslim is not lawful (to be taken) except by his consent."*[6]

None likes to be deceived through the sale, but if the resulting loss is insignificant and usually occurs among people, the deceived person has no option to cancel the deal.

The option in case of deception or misjudgment is applicable in three cases:

The first case is that of deceiving a stranger seller (or merchant) by meeting him before he reaches the market. If a Muslim enters into a business transaction with such a seller (or merchant), and then the merchant finds out that he has been paid less, he legally has the option to cancel or confirm the transaction. Imâm Muslim related that the Prophet (PBUH) said:

"Do not meet a merchant on his way and enter into business transaction with him. Whoever meets him and buys from him and then the owner of merchandise comes into the market (and finds that he has been paid less), he has the option (to declare the transaction null and void)."[7]

Thus, the Prophet (PBUH) prohibits a Muslim to meet a stranger (merchant) before he reaches the market. The Prophet (PBUH) teaches us that if such a merchant finds out that he has been paid less, he legally has the option to cancel or confirm the transaction.

Sahykhul-Islâm Ibn Taymiyah (may Allah have mercy on him) said:

"The Prophet (PBUH) stressed that a stranger (merchant) has the option to cancel or confirm the trade transaction if the buyer meets him outside the market (before the former knows about the recent market value), for it is a kind of deception and fraud."

Ibnul-Qayyim (may Allah have mercy on him) stated:

"This transaction is forbidden as the buyer can deceive the seller merchant, using the latter's unawareness of the market value, and pay him less than what is due. Therefore, the Prophet (PBUH) gives such a merchant the right of option whether to cancel or confirm such a deal when he enters the market (and knows the recent market value). Such a merchant's right of option in case of deception is indisputable, as he does not know the actual market value for his goods, and, thus, the buyer is legally considered deceitful. Likewise, a stranger has the same right if he is sold something exceedingly more expensive than that of the market value."[8]

The second case in which the option in case of deception is applicable is that of *najsh*, in which the buyer is deceived and ensnared by the artificial outbidding of a fake buyer. This is an illegal act as it involves fraud and deception to ensnare the buyer; such a kind of sale, *najsh*, was prohibited by the Prophet (PBUH) who said, *"Do not outbid in a sale in order to ensnare (others)."*[9] A similar form of such a fraudulent selling is when the owner of the commodity lies to the buyer and tells him that he has been offered such and such a price for his commodity or that he has bought it at such and such (a price). Likewise, it is regarded as *najsh* when the seller apparently insists on a certain price for his commodity, which costs much less (than this), so that the buyer may take it for the highest price possible. For instance, a seller may ask for ten pounds to sell a commodity that is worth only five in order to make the buyer pay a little less than ten.

The third case (in which the option in case of deception is applicable) is that of a gullible buyer. In this regard, Imâm Ibnul-Qayyim said:

"The Prophet (PBUH) says, 'Cheating a gullible buyer is (a kind of) ribâ[10 11]*. A gullible buyer is a person who does not know the actual value of goods and is not good at bargaining. Rather, such a person, out of his kind nature and innocence, trusts the seller. Thus, if such a buyer is gravely deceived through a sale, he has the right of option (whether to cancel the deal or not)."*[12]

Generally speaking, selling based on deception is prohibited as it is a means of cheating the buyer. In some markets of Muslims, when a new merchant offers some goods for sale, the main market merchants conspire and send one of them to bargain with the seller for a lower price. Thus, the seller becomes obliged to sell him the goods at a cheap

price (as nobody else outbids). Afterwards, the buyer returns to his fellow merchants to divide the goods among themselves. This is a prohibited sale for it is a kind of deception and injustice. In such a case, the deceived seller has the right of option to cancel the deal and restore his goods once he knows about the plot. Whoever commits such deceitful transactions must give them up and turn to Allah in repentance. Also, whoever is acquainted with the legal ruling on such sales must show his disapproval of those who practice them and report them to those in authority in order to receive deterrent punishment.

Fourth: Option in Case of Cheating

Cheating in a trade transaction means to swindle by making the commodity's advantage visible and concealing its defect. In such transactions, the seller keeps the buyer in a state of darkness so that the latter would be unable to see the defect. There are two kinds of such transactional cheating:

1) Hiding the defect of the commodity

2) Displaying the commodity beautifully in order to raise its price

All kinds of cheating are prohibited, and the *Shari'ah* (Islamic Law) permits the buyer in this case to cancel the deal as he has paid the seller for a false quality. In addition, if the buyer had known the truth, he would not have paid that much. An example of such cheating is keeping camels, cows or sheep without milking for a long time before displaying them for sale to make the buyer believe that they always give a lot of milk. The Prophet (PBUH) said:

> *"Do not keep camels or sheep without milking for a long time, for whoever buys such an animal has the option to milk it and then decide whether to keep it or return it to the owner long with one sâ'*[13] *of dates (in compensation for milking it)."*[14]

Another example of such transactional cheating is hiding the defects of a house or a used car displayed for sale to deceive the buyer.

A Muslim trader must tell the truth about his commodity for the Prophet (PBUH) said:

> *"The seller and the buyer have the right to keep or return goods as long as they have not parted. If both parties speak the truth and point out the defects and qualities (of the goods), then they will be blessed in their transaction. But if they tell lies or hide something, then the blessings of their transaction will be destroyed."*[15]

Thus, the Prophet (PBUH) states that telling the truth (while buying or selling) is a means to get Allah's blessings whereas telling lies causes the blessings to be destroyed. That is to say, a little money gained through telling the truth is blessed by Allah, but much ill-gotten money, gained through lying, has no blessing at all.

Fifth: Option in Case of Defect

It is the option given to the buyer to cancel or confirm the deal because of a defect. In this case, the commodity has a defect before sale and the seller has not mentioned it or he knows nothing about it. The legal principle that gives the buyer that option in case of defect is that a considerable defect usually reduces the value of the commodity or decreases the material of the commodity itself. In order to judge such a defect, the buyer should consult experienced, trustworthy traders; if they consider something a defect, the buyer is legally permitted to cancel the deal, and if they see no defect that reduces the value of the commodity or decreases its material, the buyer has no right to cancel the deal. Therefore, when the buyer discovers and verifies the defect after concluding the deal, he is legally permitted to confirm the deal, taking due compensation (which is the difference in price due to this defect) for the loss caused by this defect, or to cancel the deal, giving back the commodity and taking back his money.

Sixth: Option in Case of False Price

This right of option is applicable in four cases:

1- When the seller claims that he will sell the commodity at the same price he has paid for it, and then the buyer discovers that the actual price is more or less than what the seller has claimed.

2- When one claims that he will make another his partner in a transaction, then the latter discovers that the actual capital put by the former is less than what he has claimed.

3- When the seller claims that he will gain only a certain sum of money more than what he has paid for the commodity, and then the buyer discovers that the actual price is less than that.

4- When the seller claims that he will sell the commodity for a certain sum of money less than what he has paid for it, and then the buyer discovers that the actual price is less than that.

In these four cases, as long as the actual price differs from the price mentioned by the seller, the buyer has the right of option whether to cancel or confirm the deal, according to one of the opinions of the Hanbalî School. The second opinion (in the Hanbalî School) is that the buyer has no option to cancel the deal, but the deal will be based on the actual price, not the false one told by the seller, and Allah knows best.

Seventh: Option in Case of Difference

If the buyer and seller differ about the price, the commodity, its amount, or its quality, and they have no proof, each of them must swear by Allah that he tells the truth. After that, each of them has the right to cancel the deal if he is not satisfied with the oath of the other.

Eighth: Option in Case of Quality Change

Sometime a buyer purchases a commodity which he has seen some time before (concluding the deal), and then he discovers that its quality has changed. In this case, the buyer has the right of option whether to cancel or confirm the deal, and Allah knows best.

Endnotes

1 Al-Bukhârî (2112) [4/420] and Muslim (3833) [5/415].
2 Abû Dâwûd (3456) [3/474], At-Tirmidhî (1250) [3/550] and An-Nasâ'î (4495) [4/288].
3 See: "*I`lâmul-Mûwaqqi`în*" (2/307, 376), (3/301).
4 Abû Dâwûd (3594) [4/16]. See also At-Tirmidhî (1352) [3/634].
5 Ahmad (2867) [1/313] and Ibn Mâjah (2340) [3/106] and (2341).
6 Abû Ya`lâ (1570) [3/140].
7 Muslim (3802) [5/403].
8 See the footnote of "*Ar-Rawd Al-Murbi`*" [4/434].
9 Muslim (3445) [5/302].
10 *Ribâ*: A term that includes usury and usurious gain and interest.
11 Al-Bayhaqî (10924), (10925) and (10926) [5/571].
12 See the footnote of "*Ar-Rawd Al-Murbi`*" [4/435-436].
13 *Sâ`*: A standard measure that equals 2172 grams.
14 Al-Bukhârî (2148) [4/456] and Muslim (3812) [5/406].
15 Al-Bukhârî (2079) [4/391] and Muslim (3836) [5/416].

CHAPTER

5

Disposal of a Purchased Commodity Before Receipt and Rescinding of Bargains

In this chapter, Allah willing, we will deal with the rulings on the lawful disposal of a purchased commodity before receiving it. We will also illustrate how the bargain is legally concluded and when it becomes illegal.

One should be aware that it is invalid to sell a purchased commodity before receiving it whether it is measured, weighed, counted, or measured by cubit, as the *Imâms* agree. The same ruling applies to other kinds of commodities according to the preponderant view of the Muslim scholars (may Allah have mercy on them), for the Prophet (PBUH) said:

> *"He who buys a foodstuff should not sell it until he has received it with exact full measure."*
>
> (Related by Al-Bukhârî and Muslim)[1]

In another narration, it reads, "*...until he has received it.*"[2] In Muslim's narration, it states, "*...until he has weighed it.*"[3]

Ibn `Abbâs (may Allah be pleased with him) said, "*I consider that the same ruling (of foodstuffs) is applied to all types of sales.*"[4] This ruling is directly stated in the *Sunnah* (Prophetic Tradition); Imâm Ahmad related that the Prophet (PBUH) said:

> "*When you buy something, you should not sell it until you have completely received it.*"[5]

Moreover, Abû Dâwûd related:

> "*The Messenger of Allah (PBUH) forbade selling the goods where they are bought until the tradesmen take them to their houses.*"[6]

Shaykhul-Islâm Ibn Taymiyah and his student **Ibnul-Qayyim** (may Allah have mercy on them) stated:

> "*The cause behind prohibiting the buyer to sell a commodity until he has completely received it is the second buyer's inability to receive the commodity. The original seller may not deliver the commodity to the first buyer especially when the former sees the expected profit of the buyer after selling the same commodity to another person. In this case, the original seller may do his best to cancel the deal whether through rescinding or swindling. This ruling is further confirmed by the (Prophetic) prohibition of making profit through what is not in one's possession.*"[7,8]

Accordingly, Muslims must adhere to the aforementioned transactional legal rulings. When a Muslim buys a commodity, he is not permitted to sell it until he has fully received it. However, many people are negligent in this regard, as they buy goods and sell them before they receive them, or when they receive only part of them, and this is not a legal receipt of the goods. For example, a buyer may count sacks, parcels, or boxes in the store of the seller, and then sell them to another person, which is not considered a legal receipt of the goods that enables the buyer to sell them.

Some may ask, "What is then the legal receipt that enables the buyer to have disposal of the purchased commodity?" The answer is that the legal receipt of goods differs according to their kinds; every kind has its own valid receipt. If the goods are measured, weighed, counted, or measured by cubit, their valid receipt must be through measuring, weighing, counting, or measuring by cubit respectively, provided the goods are taken to a place

belonging to the buyer. If the goods are clothes, animals, cars, or the like, their valid receipt is fulfilled by taking them to a place belonging to the buyer. If the goods can be delivered by hand, such as jewels, books and the like, their valid receipt is fulfilled by the buyer's actual possession of them. Yet, if what is purchased cannot be moved to deliver, such as houses, lands, or fruit on trees, its valid receipt is fulfilled by handing it over to the buyer to be at his disposal as its new owner. The valid receipt of a house (or the like) is fulfilled by giving its key to the buyer and handing him over the property as a new owner.

We have already mentioned some *hadiths* prohibiting a Muslim to sell goods if he has not validly and fully received them from the seller. This ruling serves the interests of both the buyer and the seller, and prevents controversies and disputes resulting from the remissness of the buyer and seller when the former receives the goods from the latter, or when the buyer neither checks the commodity nor verifies its quality and specifications before exempting the seller from liability. A Muslim must adhere to and carry out the aforementioned rulings while concluding business deals.

However, many people today are remiss in the valid receipt of the goods they purchase, committing what has been prohibited by the Prophet (PBUH), and thus they suffer controversies and disputes. Sometimes, the buyer regrets when he discovers the actual specifications of the goods (after concluding the deal) and then he cannot cancel the deal except through long arguments and disputes; whoever violates the orders of the Prophet (PBUH) must regret and suffer consequences in the end.

Among the transactional acts that have been stressed and highly recommended by the Prophet (PBUH) is that either of the contractual parties is to rescind the bargain if he regrets concluding the sale, does not need the commodity any more, or is unable to pay its price. He (PBUH) said:

> "*Whoever accepts the demand of a Muslim to rescind a bargain, Allah will rescind his faults on the Day of Resurrection.*"[9]

Rescinding the bargain means to cancel it giving each of the seller and buyer his due right. Among the duties of a Muslim towards his fellow Muslim brother is to agree to rescind the bargain when the latter needs that urgently; this is a sign of gentleness and good treatment, as well as one of the requirements of brotherliness and fellowship in Islam.

Endnotes

1 Al-Bukhârî (2126) [4/435] and Muslim (3819) [5/409].
2 Al-Bukhârî (2136) [4/441] and Muslim (3823) [5/410].
3 Muslim (3818) and (3826) [5/409, 411].
4 Al-Bukhârî (2135) [4/441] and Muslim (3815) [5/408].
5 Ahmad (15253) [3/402] and An-Nasâ'î (4610) [7/329].
6 Abû Dâwûd (3499) [3/492].
7 Abû Dâwûd (3504) [3/495], At-Tirmidhî (1237) [3/535], An-Nasâ'î (4643) [4/340] and Ibn Mâjah (2188) [3/31].
8 See: "*Al-Akhbâr Al-'Ilmiyyah min Al-Ikhtiyarât Al-Fiqhiyah*" [p. 187].
9 Ibn Mâjah (2199) [3/36].

CHAPTER

6

Ribâ

Verily, the issue of *ribâ* is one of the most serious matters that should be tackled. In this regard, all of the heavenly revelations have prohibited dealing in it, and Allah warns those dealing in it with the severest threat. Allah, Exalted be He, says:

> ***"Those who consume interest cannot stand [on the Day of Resurrection] except as one stands who is being beaten by Satan into insanity..."*** (Qur'ân: Al-Baqarah: 275)

In this verse, Allah decrees for the person, who deals in *ribâ* and accepts its interest that he ***'cannot stand'*** from his grave ***'except as one stands who is being beaten by Satan into insanity'.*** This means that the usurer only stands from his grave like the epileptic when being at the time of paroxysm of epilepsy. Figuratively, this is because the usurer used to accept interest on his money in his life and thereby his abdomen became bulky with it.

Furthermore, Allah threatens the one who returns to dealing in *ribâ* after knowing that Allah has prohibited it, that he will be one of the inhabitants of the Fire wherein he will abide eternally. Allah, Exalted be He, says:

> ***"...But whoever returns [to dealing in interest or usury] – those are the companions of the Fire; they will abide eternally therein."***
>
> (Qur'ân: Al-Baqarah: 275)

Allah, Exalted be He, also says:

> ***"Allah destroys interest and gives increase for charities..."***
>
> (Qur'ân: Al-Baqarah: 276)

This verse means that Allah wipes out the blessing of money that is mingled with the interest gained from dealing in *ribâ*. Despite the fact that the usurer may become richer and richer, Allah will wipe off the blessing of his money and there will be no good in it. Rather, this money will result in bad consequences upon its owner; he will be weary in this life, punished in the Hereafter, and it will be of no avail for him.

In addition, Allah describes the usurer as a sinning disbeliever. Allah, Exalted be He, says:

> ***"Allah destroys interest and gives increase for charities. And Allah does not like every sinning disbeliever."***
>
> (Qur'ân: Al-Baqarah: 276)

Thus, Allah tells (us) that He does not like those dealing in *ribâ*. Accordingly, deprivation of the Divine love means being hated and detested by Allah. Therefore, Allah, Exalted be He, calls the one dealing in *ribâ* a disbeliever. The word 'disbeliever' may be interpreted according to two meanings. As for the first one, it refers to the person who is exceedingly ungrateful to the favors of Allah. Yet, his disbelief does not mean that he is no longer a Muslim. In other words, the usurer shows ungratefulness to the divine favors but still believes in Allah. This is due to the fact that this person does not show mercy toward the disabled, help the poor, nor grant a respite to the insolvent person until the latter's circumstances allow him to pay (to settle his due debt). With regard to the second meaning, the word ***"disbeliever"*** may refer to the actual disbeliever who is no longer a Muslim. This is when such a person deals in *ribâ* deeming it lawful. Hence, Allah, Exalted be He, describes such a person in this verse as a ***"sinning disbeliever"*** since he is immersed in committing sins and wholly engulfed in enjoying the material benefits illegally acquired from *ribâ*, and at the same time causes harm to others.

Furthermore, Allah, Exalted be He, as well as His Messenger (PBUH) have declared war against the usurer, since the latter is an enemy of Allah and His Messenger unless he stops dealing in *ribâ*. Allah describes the usurer as a wrongdoer, as He says:

> ***"O you who have believed, fear Allah and give up what remains [due to you] of interest, if you should be believers. And if you do not, then be informed of a war [against you] from Allah and His Messenger. But if you repent, you may have your principal – [thus] you do no wrong, nor are you wronged."***
>
> (Qur'ân: Al-Baqarah: 278 - 279)

In addition to all these prohibitive Qur'anic verses that deter dealing in *ribâ* and accepting interest, many other prohibitive *hadiths* are stated in the Prophet's *Sunnah* (Tradition). That is, the Prophet (PBUH) has regarded *ribâ* as one of the great destructive sins[1]. He (PBUH) has also cursed the one who accepts *ribâ*, the one who pays it, the one who records it and the two witnesses to it[2]. Moreover, the Prophet (PBUH) said that if one benefits from only one dirham[3] of *ribâ*, (when he knows that it is ill-gotten money), it will be more than (the evil of) committing adultery thirty three times[4]. In another narration, the Prophet (PBUH) said:

> *"Ribâ is like committing adultery thirty six times after the advent of Islam."*[5]

He, (PBUH), also said:

> *"Ribâ is seventy two degrees (of evil), the least of which resembles (in its sinfulness) committing adultery with one's mother."*[6]

In this connection, **Shaykhul-Islâm Ibn Taymiyah** (may Allah have mercy on him) said:

> *"The prohibition of ribâ is stronger (because of its degree of sinfulness) than the prohibition of gambling. This is because the usurer takes unlawfully an increase (the interest) from a person who is in need, while the gambler may gain this increase or lose it."*

Then, **Ibn Taymiyah** demonstrated that *ribâ*, beyond doubt, is injustice. This is because when dealing in *ribâ*, the rich person invests his power over the poor (the borrower), while in gambling, the poor may gain money from the rich or both gamblers may be equal in poverty or richness. Then he added:

> *"...As gambling involves taking money unjustly, Allah prohibits it. Yet, the injustice and harm afflicted upon the needy person (who has*

to borrow) due to ribâ are not the case in gambling. Furthermore, it is known that doing injustice to those in need (as the case of ribâ) is graver than doing injustice to others who are not in need."[7]

In addition to this, taking the interest (accrued from *ribâ* transactions) is one of the characteristics of the Jews for which they have deserved eternal and continual curse. Allah, Exalted be He, says:

> ***"For wrongdoing on the part of the Jews, We made unlawful for them [certain] good foods which had been lawful to them, and for their averting from the way of Allah many [people]. And [for] their taking of usury while they had been forbidden from it, and their consuming of the people's wealth unjustly. And we have prepared for the disbelievers among them a painful punishment."***
>
> (Qur'ân: An-Nisâ': 160 -161)

The Wisdom behind Prohibiting Dealing in *Ribâ*

- Dealing in *ribâ* involves consuming people's wealth unjustly. That is, the usurer takes *ribâ* from people without giving them anything useful in return.
- Dealing in *ribâ* involves causing harm to those in need and who borrow by increasing the debts due upon them (interest rates) when they are unable to pay their debts.
- *Ribâ* prevents favors and kind treatment among people, blocks good loans (i.e. loans without interests), opens the door wide for lending for interest, which overburdens the needy borrower.
- *Ribâ* also results in stopping gains, trades, professions and crafts without which other people's interests would not be set right. This is because, when the usurer increases his money through *ribâ*, without exerting any effort, then why should he look for other ways to gain his livelihood? In this regard, Allah, Exalted be He, has made dealings among people be based on mutual benefit in return for work or a material return. On the other hand, dealing in *ribâ* does not involve this, since it is simply giving money multiplied, from one party to another, without any visible product or work.

Linguistically, the word "*ribâ*" in Arabic means increase, while jurisprudentially, *ribâ* means increase in particular things, and it is divided into two kinds. The first is *riban-nasî'ah* (conditional excess for delay of payment) and the other kind is *ribal-fadl* (the selling of an item for another of the same type, on the spot, but in excess)

Riban-Nasî'ah (Delay Usury)

The word '*nasî'ah*' in Arabic refers to delay. *Riban-nasî'ah* involves two types:

First: Increasing the debt on the insolvent person (by way of an interest rate). This is the origin of *ribâ* which used to be done in the Pre-Islamic Period of Ignorance (*Al-Jâhiliyyah*). It means that a person owes another person a sum of money that is to be paid at a certain time. So, when it is time for paying back, the creditor gives the debtor the option either to pay the debt or to allow him much more time in return for an interest on the borrowed sum. Therefore, if the debtor chooses not to settle his debt, the creditor prolongs the period of payment against an interest, which thereby results in the excessive increase of the debt. This is why Allah, Exalted be He, prohibits this type of transactions saying:

"***...And if someone is in hardship, then [let there be] postponement until [a time of] ease...***" (Qur'ân: Al-Baqarah: 280)

The verse signifies that if the time of payment is due and the debtor is unable to fulfill his debt, it is impermissible for the creditor to increase debt; rather the creditor should give the debtor a grace period. On the other hand, if the debtor is wealthy, he is to pay his due debt. Hence, no increase on the debt (by way of an interest) should be made whether the debtor is insolvent or not.

Second: It refers to the *ribâ* taken through selling goods of the same type but in excess (which is the property in the case of *ribal-fadl*) with delaying the date of delivery, whether for both or just one of the items. There are many examples of this type, such as selling gold for gold, silver for silver, wheat for wheat, barley for barley, dates for dates, salt for salt and the like. Besides, this type includes selling any type of these items for the same on credit. The same applies to whatever shares these items in the property (of *ribal-fadl*), as will be pointed out below.

Ribal-Fadl (Excess Usury)

This type of *ribâ* refers to the selling of an item for another of the same type but in excess. With regard to this issue, the Prophet (PBUH) dictates that this kind of transactions is prohibited in six items, namely, gold, silver, wheat, barley, dates and salt. Thus, if any of these items is sold in exchange for another of the same type, then it is prohibited to take more than the other (in weight or

measure). This is due to the *hadîth* narrated by 'Ubâdah Ibnuş-Şâmit (may Allah be pleased with him) as a *marfû'* (traceable) *hadîth*,[8] in which the Prophet (PBUH) said:

> *"Gold is to be paid for gold, silver for silver, wheat for wheat, barley for barley, dates for dates, and salt for salt, like for like and equal for equal, and payment is to be made hand to hand."*
>
> (Related by Imâm Ahmad and Imâm Muslim)[9]

The above *hadîth* states the prohibition of paying gold for gold, all its types; coined or not, silver for silver, wheat for wheat, barley for barley or dates for dates, unless like for like, equal for equal and payment is made on the spot. Furthermore, the majority of scholars uniformly agree on the prohibition of selling an item as a payment for another unless both are equal. The same ruling applies to other things that share the same cause of judgment. Yet, scholars differ as regards setting such cause of judgment. In this respect, the soundest view is that the common property in money (coins or banknotes) is its value. That is other similar types are to be valued according to the value of money, such as those banknotes used today. Hence, it is maintained prohibited to sell any of such items in excess for another of the same type, namely, being issued in the same country.

As for the cause of judgment of the rest of the six items – mentioned in the previous *hadîth*, namely, wheat, barley, dates and salt – it is the measure or weight; besides, such items are edible. Thus, the same ruling applies to whatever shares any of their property, as regards weight or measure and edibility. That is, such type of transactions (i.e. *ribal-fadl*) is viewed prohibited, unless there is equality in measure or weight.

In this connection, **Shaykhul-Islâm Ibn Taymiyah** (may Allah have mercy on him) says:

> *"... The criterion in prohibiting the transactions of ribal-fadl is measure or weight (of items being paid for other items) in addition to edibility. This is one of the two views maintained by Imâm Ahmad."*[10]

Accordingly, whatever item shares these six items mentioned in the *hadîth* in that cause of judgment (namely being edible and measurable or being edible and can be weighed, or is paid for as a price), it is to be included in transactions condemned as *ribâ*. Similarly, if such items share that cause of judgment as well as being of the same type, then it is prohibited to sell wheat for wheat, for example, in excess or with delaying the payment. This is based on the *hadîth* of the Prophet (PBUH), in which he says:

"Gold is to be paid for gold, silver for silver, wheat for wheat, barley for barley, dates for dates, and salt for salt, like for like and equal for equal, and payment is to be made hand to hand."[11]

Furthermore, if the items share the same cause of judgment but differ in type, such as in cases of selling wheat for barley, it is prohibited to delay payment; it must be made on the spot. While, in this case, it is permissible to sell one type for more of the other. This is due to the *hadith*, in which the Prophet (PBUH) says:

"...If these classes differ, then sell as you wish if payment is made hand to hand."

(Related by Muslim and Abû Dâwûd)[12]

The phrase "hand to hand" here means that payment must take place on the spot before the two parties separate. On the other hand, if the items are different in both cause of judgment and type, it is maintained permissible to pay one type for more of another, so is the case of delaying payment, such as selling gold for wheat or silver for barley.

Let it be known to you, dear Muslim reader, that it is viewed impermissible to sell an item which could be weighed for another of the same type except with equal weight. Besides, it is impermissible to sell a measurable item for another of the same type except with equal measure. This is due to the *hadith*, in which the Prophet (PBUH) says:

"Gold is to be paid for gold with equal weight, and silver is to be paid for silver with equal weight, and wheat is to be paid for wheat with equal measure, and barley is to be paid for barley with equal measure."[13]

Besides, since items will not be equal when their legal criterion (measure or weight) is different, it is impermissible to sell an item that can be weighed or measured with a random weight or measure for another of the same type. This is because one does not guarantee that both items are equal; hence, ignorance of equality is like knowing about excess (in one item over the other).

As for the issue of money exchange, whether of the same type or not, and whether money is of gold, silver or banknotes, which are common these days, the same ruling applied to the selling of gold and silver is to be applied to it. This is based on the fact that they share the same property; being of value that

can be measured. Thereupon, if an amount of money is exchanged for another of the same type, such as gold coins for gold coins, silver coins for silver coins or any category of paper money for another of the same type (e.g., a dollar for a dollar or Saudi paper dirhams for the like), both exchanged items must be equal in value. Besides, payment must take place on the spot. However, if an amount of money of one type is exchanged for another of a different type, such as exchanging Saudi paper riyals for US dollars, or exchanging gold coins for silver coins, both parties (the buyer and the seller) must be present at the time of the exchange, and payment must take place on the spot. In such a case, it is permissible to exchange one type for more of the other type, both according to their value. Similarly, if a piece of gold jewelry is sold for silver dirhams or for paper money, both the buyer and the seller must be present at the time of the transaction, and the payment must take place on the spot. The same applies to the selling of silver jewelry for gold coins.

On the other hand, if a piece of gold or silver jewelry is sold for jewelry or money of the same type, such as in the case of selling a piece of gold for gold or a piece of silver for silver, there are two matters that should be fulfilled. First, both pieces must be equal in weight. Second, both the buyer and the seller must be present at the time of concluding the transaction and the payment must take place on the spot.

With regard to this, dealing in *ribâ* implies a great danger that one cannot avoid, unless one is well acquainted with its rulings. Therefore, whoever is not able to know about its rulings by himself can ask the people of knowledge. This is because it is not permissible for someone to undertake any transaction, except when being certain that it does not involve *ribâ*, so that his religion can be saved and he can rescue himself from Allah's punishment, with which He has threatened the usurers. It is also impermissible to imitate others in any kind of transactions, without considering it carefully, especially nowadays when people do not consider the ways through which they can get their wealth and gains: be they lawful or not. In this respect, the Prophet (PBUH) said:

> *"There will come a time when people will eat (i.e., take) ribâ. Even the one who will not eat it may not spare its dust (i.e. he will be affected by it in a way or another)."*[14]

It is worth mentioning here that there are many usurious transactions undertaken nowadays. One of these transactions is increasing the debt on the insolvent debtor (by way of an interest rate) when one's debt becomes due and one is unable to fulfill it. That is, the creditor allows the debtor to

postpone fulfilling the debt and in return, he increases that debt in a certain percentage according to the debtor's period of delay. This is the *ribâ* done at the Pre-Islamic Period of Ignorance (*Al-Jâhiliyyah*) which is prohibited according to the unanimous agreement of Muslim scholars. In this regard, Allah, Exalted be He, says:

> ***"O you who have believed, fear Allah and give up what remains [due to you] of interest, if you should be believers. And if you do not, then be informed of a war [against you] from Allah and His Messenger. But if you repent, you may have your principal – [thus] you do no wrong, nor are you wronged. And if someone is in hardship, then [let there be] postponement until [a time of] ease..."*** (Qur'ân: Al-Baqarah: 278-280)

In these noble verses, Allah, Exalted be He, threatens those taking and dealing in *ribâ* with many threats. These threats involve:

First, Allah, Exalted be He, addresses His servants saying, ***"O you who have believed..."*** and ***"...if you should be believers..."*** which indicates that it is not proper for a believer to deal in *ribâ*.

Second, Allah, Exalted be He, says, ***"...fear Allah..."*** which indicates that those dealing in *ribâ* do not obey Allah nor do they fear Him.

Third, Allah says, ***"...and give up what remains [due to you] of interest..."*** This part of the verse is considered a divine command that obligates refraining from dealing in *ribâ*. Hence, this prohibition indicates that whoever deals in it disobeys the Command of Allah.

Fourth, Allah, Exalted be He, has declared war against those who do not give up dealing in *ribâ*, as He, says, ***"...and if you do not..."*** which means if those dealing in *ribâ* do not give up, ***"... then be informed of a war [against you] from Allah and His Messenger..."*** This means that those dealing in *ribâ* should come to know that they, indeed, wage war against Allah and His Messenger.

Fifth, Allah, Exalted be He, addresses the usurer as a wrongdoer, saying, ***"...but if you repent, you may have your principal – [thus] you do no wrong, nor are you wronged."***

There is another usurious transaction, namely lending against a specified interest. This is through lending something to someone, such as an amount of money, on the condition that the borrowed amount be paid back with an interest. It may also be through crediting an amount of money on the

condition that the borrower must return more than its actual value according to an agreed upon percentage. These are explicit usurious transactions done in banks as well as the other banking institutions, as they conclude transactions through lending loans for those needing them, traders, factory owners, etc. They lend these categories charging them a fixed interest calculated according to a specified percentage. Such percentage is increased in case of failure to pay the amount of the loan on its due time. Thus, such type of lending involves both types of *riba*, namely *ribal-fadl* (excess usury) and *riban-nasi'ah* (delay usury).

Similarly, depositing at banking institutions for a specified period and against a specified interest is considered one of the usurious transactions. During this period, the bank has the right of free disposal, as regards the deposited amount until the maturity date. So, the depositors are paid (by the bank) a fixed interest according to a certain percentage on the total sum of the deposits, such as 5 or 10 percent.

Likewise, the issue of *'înah*[15] transactions is considered amongst the usurious transactions. It refers to a transaction in which one buys a commodity on credit then sells it in cash to the same person but at a less price. In this kind of transactions, the buyer takes an amount of cash against the commodity previously bought on credit, yet it is but a pretext for gaining *ribâ*. There are many *hadîths* and traditions forbidding dealing in *'înah* transactions. For example, Abû Dâwûd relates a *hadîth*, in which the Prophet (PBUH) says:

> *"If you sell to one another with 'înah, hold the tails of cows (i.e. become occupied with worldly gains), are pleased with agriculture, and give up conducting jihâd (fighting in the Cause of Allah), Allah will make disgrace prevail over you, and will not withdraw it until you return (i.e. adhere) to your religion."*[16]

The Prophet (PBUH) also says:

> *"There will come a time for people when they will consider ribâ lawful by means of trade."*

Therefore, every Muslim must take precaution lest *ribâ* should be mingled with his transactions and money. This is because taking *ribâ* and dealing in it are among the major sins. Besides, no people deal in *ribâ* and commit adultery, but Allah, Exalted be He, afflicts them with poverty, incurable diseases and injustice from rulers. Moreover, *ribâ* causes destruction to one's wealth and wipes off its blessing.

Furthermore, Allah strongly warns and threatens Muslims against accepting *ribâ* making it one of the most abominable deeds and one of the most grievous of major sins. Allah, Exalted be He, also demonstrates the penalty be imposed on the usurer in both this life and in the Hereafter, as He stated, in the Glorious Qur'ân, that the usurer wages war against Allah and His Messenger (PBUH). Thus, Allah punishes the usurers in this world through destroying the blessing of their wealth making it subject to damage and ruin. How often we hear about people's huge wealth being damaged by way of fires and flood, thus turning its owners into poor people! However, if those usurious people still keep their wealth acquired through *ribâ*, such wealth will be of no use since Allah takes away its blessing. Besides, those people only suffer the trouble of its collection, bear its imposed punishment (on the Day of Resurrection) as well as become tormented in the Hellfire for it.

In addition, the usurer is hated by Allah as well as by the people, since he takes money but never gives in return, collects wealth and withholds it from people, and spends but never in charity. Moreover, he is a greedy miser who collects money and abstains from spending it in goodness. As a result, people's hearts and the community are disinclined towards such a person. In fact, this is considered the worldly torment for this person while his torment in the Hereafter is more severe and more enduring, as demonstrated in the Glorious Qur'ân. This is because *ribâ* is a prohibited gain that causes a harmful privation and is regarded as a frightening nightmare from which all societies suffer.

Endnotes

1 Al-Bukhâri (2766) [5/481] and Muslim (258) [1/273].
2 Muslim (4069) [6/28] and (4068).
3 A dirham of silver equals 2.975 grams of silver.
4 Aḥmad (21855) [5/225] and Ad-Dâraquṭni (2820) [3/13].
5 Aḥmad (21854) [5/225], Ad-Dârquṭni (2821) [3/13] and Aṭ-Ṭabarâni in his book "*Al-Awsaṭ*" (7151) [7/158].
6 Ibn Mâjah (2274) [3/72] and (2275).
7 See: "*Majmû 'ul Fatâwâ*" (20/341, 347).
8 *Marfû'* (traceable) *ḥadîth* is whatever word, deed, approval or attribute, traced directly back to the Prophet (PBUH) with a connected or disconnected chain of transmission.
9 Muslim (4039) [6/16] and Aḥmad (9605) [2/438].

10 See: "*Majmû 'ul Fatâwâ.*"
11 Muslim (4039) [6/16] and Aḥmad (9605) [2/438].
12 Muslim (4039) [6/16] and Abû Dâwûd (3350) [3/419].
13 Muslim (4540) [6/17].
14 Abû Dâwûd (3331) [3/407], An-Nasâ'i (4467) [4/279] and Ibn Mâjah (2278) [3/74].
15 '*Înah:* A usurious kind of transaction in which a seller sells a commodity on credit to a buyer and then buys it from him at the same time at a lower price. For example, a trader sells a car for twenty thousand pounds on credit then buys it from the same man (who has just bought it) for fifteen thousand pounds cash. Thus, the original buyer owes the seller twenty thousand pounds to be paid at the due time.
16 Abû Dâwûd (3462) [3/477].

CHAPTER

7

Selling Assets

Assets include houses, lands and trees. It can be safely said that whatever is related to these assets when sold, is for the buyer, and whatever is not related to these items remains the property of the seller. When both the buyer and the seller are acquainted with these rulings, they will settle any dispute that may arise between them. They will also recognize each one's duties and obligations. This is because Islam has not left a matter in which there may be a benefit for Muslims or harm but has demonstrated it. Besides, if the rulings of Islam are properly applied, any conflicts or disputes will be properly settled. One of these matters is selling an item while there are other items related to it; auxiliary, complementary or installations attached to or detached from this sold item. Besides, the sold item may be of a continuous growth (e.g., selling a piece of land containing a certain crop that can be harvested for many times; so there is a continual gain) and may not be like that. All of these matters may cause a dispute between the buyer and the seller, as to whom shall all these auxiliaries, complementary items and installations

belong. In order to issue a judgment in this dispute, the *faqīhs* (may Allah have mercy on them) have decided to dedicate a chapter in jurisprudence and be entitled "Selling Assets and Fruits" wherein they have demonstrated all such pertaining rulings.

If someone sells a house, the sale includes the building and roof, since both are included in the appellation of a house. This sale also includes whatever items are attached to the house and considered among its necessities, such as doors, stairs, shelves and machineries installed in the house. These machineries include electrical tools, lifting apparatuses, lamps, water tanks positioned under the ground or above the roofs, pipes specified for distributing water, air-conditioners, etc. This kind of sale will also include whatever the house contains of trees, plants and sunshades setup in it. This sale also includes whatever is inside the land of the house of solid metals.

As for objects lodged in the house and detached from it, the sale does not include them. These detached things include wood, ropes, vessels, furniture and whatever is buried in the ground of the house for keeping, such as stones, treasures and the like. All these items are not to be included in the sale, since they are detached from the house and are not within its appellation, excluding things without which one could not make use of the house, such as keys, even if these things are detached from the house.

If one sells a land, this sale includes whatever is attached to it and which will last for a period, such as trees and buildings. In the case of selling a garden, the sale includes the land, the trees, the walls and the buildings thereof. If one sells a land with plants that are to be harvested for only one time, such as wheat and barley, then these plants belong to the seller and are not to be included in the contract of sale. However, if the land is sold with plants that are frequently cut (like the grass) or picked (such as cucumber or eggplants), the plants belong to the buyer since it is attached to the land. At the time of sale, if there are any plants that are to be harvested, they belong to the seller.

All of this detailed explanation and rulings are applicable to whatever belongs to the seller and the buyer when selling an asset, in case both parties do not agree on other conditions. Hence, if a party makes a condition stating that such objects are possessed by only one of them, both parties must keep to this condition. This is because the Prophet (PBUH) says:

"Muslims must keep to the conditions they make."[1]

If somebody sells pollinated date palms, the dates are for the seller. This is according to the *hadith*, in which the Prophet (PBUH) says:

> *"If somebody sells pollinated date palms, the fruits will be for the seller unless the buyer stipulates that they will be for himself (and the seller agrees)."*
>
> (Related by Al-Bukhârî and Muslim)[2]

The same applies to other plants, such as grapes, mulberry and pomegranate; if sold after the appearance of their fruits, the fruits are to be for the seller. Thereupon, whatever is sold before the pollination of date palms or the appearance of fruits, as regards grapes and the like, such plants and fruits are for the buyer. This is based on the general meaning of the above-mentioned *hadith*. Besides, the same ruling pertaining to date palms applies to other objects by means of analogical deduction.

Thus, we realize how complete and perfect is our *Sharî'ah* (Islamic Law), which solves the problems facing people, gives rights to whom are entitled to them in a just manner without causing any harm. There is no problem but our *Sharî'ah* has provided for it a justifying, wise solution. This *Sharî'ah* is a legislation from our Lord, the Wise and the Praiseworthy. Allah knows what benefits His servants and what causes harm to them, in all places and times.

True are the Words of Allah, the Most Great, Who says:

> ***"O you who have believed, obey Allah and obey the Messenger and those in authority among you. And if you disagree over anything, refer it to Allah and the Messenger, if you should believe in Allah and the Last Day. That is the best [way] and best in result."***
>
> (Qur'ân: An-Nisâ': 59)

Verily, no judgment other than that of Allah and His Messenger (PBUH) can decisively settle any dispute among people, and benefit them and convince the believers.

As for the human systems of legislation, they are as imperfect and incapable as humans themselves are. Besides, these systems are influenced by personal inclinations and tendencies, as Allah, Exalted be He, says:

> ***"But if the Truth [i.e. Allah] had followed their inclinations, the heavens and the earth and whoever is in them would have been ruined..."*** (Qur'ân: Al-Mu'minûn: 71)

Therefore, away with those who have replaced the judgment of Allah and His Messenger (PBUH) with laws of humans! And may they be ruined. In this regard, Allah says:

> ***"Then is it the judgment of [the time of] ignorance they desire? But who is better than Allah in judgment for a people who are certain [in faith]?"*** (Qur'ān: Al-Mā'idah: 50)

We invoke Allah to render His Religion (Islam) victorious over falsehood, elevate His word, and protect Muslims from whatever plots their enemies contrive; He is the Hearing and the Responsive.

Endnotes

1 Abū Dāwūd (3594) [4/16]. See also At-Tirmidhi (1352) [3/634].
2 Al-Bukhārī (2379) [5/62] and Muslim (3882) [5/432].

CHAPTER

8

Selling Fruits

Fruits are whatever date palms or other kinds of trees carry of edible ripe produce. One of the rulings on selling fruits is that it is impermissible to sell the fruits on trees before the appearance of ripeness. This is because the Prophet (PBUH) forbade the sale of fruits until they are ripe (free from blight). He forbade both the seller and the buyer such a sale[1]. Thereupon, the Prophet forbade the seller from selling his fruits before they become ripe and free from any blight lest he should devour the buyer's money unjustly. The Prophet (PBUH) also forbade the buyer from that kind of transactions since he would thus help the seller in devouring money unjustly. It is also stated in the Two *Sahihs*[2] that the Prophet (PBUH) forbade selling fruits until they are almost ripe. When he (PBUH) was asked about the signs of ripeness, he replied, "*They get red or yellow (fit for eating).*"[3] The forbiddance in the two above-stated *hadiths* indicates the invalidity of any transaction concluded before the signs of ripeness appear.

Besides, it is impermissible to sell plants until they are almost full-grown (safe from blight). This is according to the *hadith* related by Imâm Muslim on the authority of Ibn 'Umar, stating:

> *"The Messenger of Allah (PBUH) forbade selling date palms until the dates are almost ripe, and (he forbade selling) ears of corn until they are white and safe from blight. He forbade both the seller and the buyer from such sale."*[4]

This *hadith* proves that it is forbidden to sell plants until they are almost full-grown, that is by becoming white (ears of corn) and safe from any plant disease. The wisdom behind forbidding the sale of fruits until they are almost ripe and of plants until they are almost full-grown, is that they are subjected, before their ripeness and full growth, to plant diseases and damage. The Prophet (PBUH) demonstrates this by saying:

> *"If Allah destroyed the fruits (present on the trees), what right would one of you have to take the money of his (Muslim) brother?"*[5]

He has also forbidden us from selling ears of corn *"until they are white and safe from blight."* 'Blight' here means any plant disease which may afflict plants resulting in their destruction. This Prophetic injunction is verily a mercy for people, and a means of preserving their money as well as preventing any conflict that may arise among them, and which may lead to animosity and hatred.

Thereby, it manifestly appears how much attention Islam pays to the sanctity of the Muslim's property. The Prophet (PBUH) says:

> *"If Allah destroyed the fruits (present on the trees), with what right would you (the seller) take the money of your (Muslim) brother?"*

In this *hadith*, there is a warning for whoever resorts to tricky methods for taking people's money unlawfully. This *hadith* also urges the Muslim to ensure the safety of his money and keep away from wasting it, as the Prophet (PBUH) forbade the buyer from buying fruits until they are almost ripe and free from blight. This is because if these fruits were damaged and their money was paid by the buyer, the buyer's money would be lost or it would be difficult to return it.

It becomes clear from the above-mentioned *hadith* that the Prophetic prohibition of selling fruits until they are almost ripe indicates making the ruling dependent on the most probable condition. In other words, it is more probable that fruits be damaged before ripeness; thereupon, it becomes impermissible to sell them. While, the most probable condition is that fruits

be safe from blight after their ripeness, and therefore it becomes permissible to sell them. Moreover, it can be understood from the same *hadith* that it is impermissible for one to expose one's money to danger or waste, even if both parties agree that there will be a sort of compensation for the damaged fruits, which is considered an unsafe procedure.

Due to the above, it is impermissible to sell fruits before they are almost ripe, namely fruits can be sold alone without the trees (carrying them) provided that these fruits are left (on the trees) until they are ripe before being sold. However, if these fruits are sold along with the trees or sold in their present condition (i.e., before ripeness), this becomes permissible according to three cases mentioned and demonstrated by the *faqihs* (may Allah have mercy on them).

First: It is permissible to sell fruits before they become ripe with their trees. That is, fruits become part of the sold item (their trees). The same applies to the selling of the unripe plants along with the land, as the unripe plants belong to the land in this case.

Second: It is permissible to sell the fruits or unripe plants before becoming ripe or full-grown to the owner of the land or the fruits. This is because if those fruits are sold to the owner, then he gets the fruits or the unripe plants fully, as he is the actual owner. Though this kind of selling is valid, it is a debatable issue since some scholars maintain that this case implicitly falls under the general meaning of the Prophetic injunction forbidding the sale of fruits before they are almost ripe.

Third: It is permissible to sell fruits and plants (ears of corn for example) before their ripeness and full growth on the condition that they are picked or cut immediately after the sale, and that the buyer can make use of them at that time. This is because the Prophet (PBUH) forbade the sale of fruits (and the like) before they are almost ripe for fear that they may get damaged or blighted; however, this will not be the case when fruits and plants are picked or cut immediately after concluding the sale. By contrast, if the fruits and plants will be of no use if they are cut immediately after concluding the sale, selling them becomes impermissible. This is because this leads to damage and waste of one's money, while the Prophet (PBUH) forbade wasting one's property[6].

Yet, according to the soundest view of scholars in this regard, it is permissible to sell crops that are frequently cut or picked, such as grass plants of the pea family, cucumber, eggplant and the like. So, it is permissible to sell their present or future produce. With regard to this, **Shaykhul-Islâm Ibn Taymiyah** (may Allah have mercy on him) says:

> *"... The soundest view with regard to this issue is that this (the latter) kind of sale is not included in the Prophet's prohibition. The contract of sale is valid when one sells the present produce and the future one whose fruits have not appeared yet, until the frequently cut or picked produce becomes dry, since necessity requires this. Thus, it is permissible to sell the frequently cut or picked produce without their plants."*[7]

Moreover, the great scholar **Ibnul-Qayyim** (may Allah have mercy on him) says:

> *"The Prophet (PBUH) only forbade the selling of fruits which could be sold at a later time until they appear to be almost ripe. However, the frequently cut or picked produce (such as cucumber) is not included in the Prophet's prohibition."*[8]

Endnotes

1 Al-Bukhârî (2194) [4/497] and Muslim (3840) [5/418]..
2 The Two Sahihs: The Two Authentic Books of Al-Bukhârî and Muslim.
3 Al-Bukhârî (2195) [4/498] and Muslim (3954) [5/460].
4 Muslim (3842) [5/419] and Al-Bukhârî (2197) [4/502].
5 Al-Bukhârî (2208) [4/510] and Muslim (3954) [5/460].
6 Al-Bukhârî (6473) [11/371] and Muslim (4459) [6/238].
7 See: "*Majmû`ul-Fatâwâ*" (37/205).
8 See the footnote of "*Ar-Rawd Al-Murbi`*" [4/546].

CHAPTER

9

Blighted Fruits: Rulings

Blight refers to any plant disease affecting fruits resulting in their destruction. In this regard, fruits may be sold when they are almost ripe, and it is permissible to sell them, and after that, they may be hit by blight. Divine Blights refer to matters that are beyond the powers of human intervention, such as wind, heat, drought, rain, coldness, locusts, etc. If the buyer then could not collect the fruits before being afflicted, the buyer is allowed to take whatever amount of money he had paid for those blighted fruits. This is due to the *hadith* narrated by Jâbir Ibn `Abdullâh (may Allah be pleased with him) and related by Imâm Muslim, stating that the Prophet (PBUH) has commanded to return the payment of those (fruits) struck with a blight[1].

The aforementioned *hadith* signifies that the blighted fruits belong to the seller and the buyer is to take whatever price he has paid for them. Thus, if all the (sold) fruits are blighted, the buyer is to be repaid whatever payment he has given, but if some of those fruits are blighted, he is to ask only for what is equal to the value of the blighted fruits. This is based on the general meaning of the above-mentioned *hadith*. This also applies whether the sale

has been concluded before the ripeness of the fruits or afterwards, according to general meaning of this *hadith* and according to the *hadith* in which the Prophet (PBUH) says:

> *"How could you take the money of your (Muslim) brother without a right?"*[2]

However, if the blighted quantity of the sold fruits is little and could not be exactly defined, the buyer, and not the seller, is to bear its responsibility, since this is common among products. Moreover, this damaged quantity is not considered blight and cannot be avoided; for example, it may happen when birds eat from fruits or what may drop on the ground and the like. In this respect, scholars maintain that this quantity is not to be regarded as a blighted produce as long as the damage does not reach the third of the whole quantity. Yet, the most preponderant opinion is that the amount is not to be determined in this manner, but it is to be decided according to the common convention among people in this regard. This is because deciding a certain quantity necessitates the presence of a proof.

Scholars (may Allah have mercy on them) maintain that the seller should bear the responsibility of the blighted fruits because when the seller sells the fruits on the trees by leaving them to the buyer, fruits are not actually handed over. In other words, it is as if he has not given him those fruits from the start. This applies to the fruits struck with a divine blight.

However, if the fruits are damaged by way of a human cause, such as a fire (started willfully), the buyer is to be given the choice between two things. The first is abrogating the sale and asking the seller to repay what he has paid. The seller should then ask the person who caused damage to bear the responsibility for what he has damaged. The second option is concluding the sale and asking the one who has caused the damage to give compensation.

The Prophet (PBUH) stipulated that fruits are not to be sold until they are almost ripe. Actually, the signs through which trees other than palm are known to have reached ripeness differ according to each kind of trees. As for grapes, the sign of ripeness is when their taste becomes sweet. This is due to the *hadith* narrated by Anas that the Prophet (PBUH) forbade the sale of grapes until they become black (ripen) [3]. (Related by Imâm Ahmad with a trustworthy chain of transmitters)

As for the sign indicating the ripeness of other fruits (such as apples, watermelon, pomegranate, apricots, plum, walnuts and the like), it is the appearance of their ripeness and being fit for eating. This is based on the *hadîth* related by Al-Bukhârî and Muslim in which the Prophet (PBUH) forbade selling fruits until they get ripe[4]. This *hadîth* is narrated in another wording as, "*...when it is fit for eating.*" As for cucumber and the like, the sign of their ripeness is when they become fit for eating. However, grains are known to be ripe when they are fully-grown and white, since the Prophet (PBUH) deems it permissible to sell grains only when they are fully-grown and hard[5].

Endnotes

1 Muslim (3957) [5/462].
2 Muslim (3952) [5/460]. See also Al-Bukhârî (2208) [4/510] and Muslim (3954) [5/460].
3 Abû Dâwûd (3371) [3/432], At-Tirmidhî (1231) [3/530] and Ibn Mâjah (2217) [3/45].
4 Al-Bukhârî (2196) [4/498] and Muslim (3849) [5/421].
5 Related by the Five Compilers of *Hadîth* except An-Nasâ'î.

CHAPTER

10

The *Salam* (Sale of Payment in Advance)

The *salam* is payment in advance with delaying the receipt of the sold item. The Muslim *faqīhs* (may Allah have mercy on them) define the *salam* as:

> *"A contract according to which the price of a clearly defined item is paid in advance at the place of concluding the contract, and the sold item is to be received later."*

This kind of transactions is permissible according to the Qur'ān, the *Sunnah* (Prophetic Tradition) and the consensus of Muslim scholars. What proves that is what Allah, Exalted be He, says:

> ***"O you who have believed, when you contract a debt for a specified term, write it down..."*** (Qur'ān: Al-Baqarah: 282)

Ibn `Abbâs (may Allah be pleased with him) says:

> *"I testify that Allah has made lawful to us (Muslims) to pay in advance for the price of a thing to be delivered later after a specified term. He then recited this above-mentioned verse."*[1]

When the Prophet (PBUH) arrived at Medina and found its people paying in advance the price of fruits to be delivered later after a year, two or three, he said:

> *"Whoever pays in advance the price of a thing - (or "...of fruits..." according to another narration) - to be delivered later should pay it for a specified measure at specified weight for a specified period."*
>
> (Related by Al-Bukhârî and Muslim)[2]

This *hadith* proves that the *salam* is permissible when these conditions are fulfilled. Besides, Ibnul-Mundhir and other scholars report that scholars uniformly agree that the *salam* is permissible[3]. Moreover, people need the *salam*, since one of the parties of the transaction may be in need for being paid the price of an item in advance while the other may be in need for buying an item for a cheap price.

In addition to the conditions of selling, there are some conditions necessary for validating the *salam*:

First: The sold item whose price is to be paid in advance must have definite properties. This is because items whose properties cannot be defined undergo many changes, which causes disputes between the two parties of the sale (at the time of receiving the sold item). Thereupon, the *salam* is not valid in items whose properties may change, such as pulses, leather, utensils and jewels.

Second: The kind and the class of the sold item must be defined. For example, if the sold item is wheat, the kind must be defined, which is wheat here, and the class of that wheat must be defined such as *As-salamûnî* (a type of wheat).

Third: The sold item must be a specified quantity, weight or measure. This is according to the meaning of the *hadîth* in which the Prophet (PBUH) says:

> *"Whoever pays in advance the price of a thing to be delivered later should pay it for a specified measure or a specified weight and for a specified period."*
> (Related by Al-Bukhârî and Muslim)

Besides, if the quantity of the sold item is unspecified, it becomes difficult to be exact.

Fourth: There must be a specified period for receiving the sold item. This is because the Prophet says in the above-mentioned *hadîth*, "*...for a specified period.*" Besides, Allah, Exalted be He, says:

"O you who have believed, when you contract a debt for a specified term, write it down..." (Qur'ân: Al-Baqarah: 282)

With regard to this issue, both the *hadîth* and the noble verse state that in the *salam* both parties agree to the condition stating that the sold item is to be delivered later according to a specified period known to both of them.

Fifth: The item sold must be present when the time of reception is due, in order to be delivered at the stipulated time. Thereby, if that item is not available when its time of delivery is due, the *salam* does not become valid, such as paying the price of ripe dates and grapes in advance and stipulating that the sold item be delivered in winter, (such crops are not available at such a time).

Sixth: The price of the sold item must be paid fully in advance at the time of concluding the contract. This is according to the *hadîth* in which the Prophet (PBUH) says:

"*Whoever pays in advance the price of a thing to be delivered later should pay it for a specified measure...*"

In this connection, **Imâm Ash-Shâfi'î** (may Allah have mercy on him) said:

"*The transaction of the salam is not valid, except when the price is paid in advance and before the two parties (the seller and the buyer) leave the place where they have concluded the transaction. Besides, if the price of the sold item is not paid at the time of concluding the contract, it will be regarded as selling a debt for a debt, which is impermissible.*"

Seventh: The sold item is not to be specific (e.g. a certain house or a specified tree). Rather, it should be regarded as a debt in the seller's liability. Thereby, the *salam* is not valid when specifying a certain house or a certain tree to be given, because this tree or house may get damaged before being delivered to the buyer. In this way, the desired purpose for which the *salam* has been decreed will not be fulfilled.

Besides, the delivery of the sold item is to be in the same place where the contract of the *salam* has been concluded, if possible. If this place is not fit for delivery (e.g. they concluded the contract at a certain spot on land or at sea), then the place of delivery must be mentioned in the contract. Moreover, if the two parties agree on the place of delivery, the *salam* becomes permissible. Otherwise, they must resort to the place where the contract has been concluded, for it was fit for concluding the transaction from the start, as mentioned before.

One of the rulings on the *salam* is that it is impermissible to sell the item sold according to the *salam* to someone else (by the buyer) before it is received. This is because the Prophet (PBUH) forbade selling foodstuffs before receiving them[4]. In this case, the *hawâlah*[5] is invalid, since the *hawâlah* is only valid regarding a stable debt while the *salam* can then be annulled.

Another ruling on the *salam* is that if the sold item is not present or available at the due time, such as in cases when the trees have not born fruits at the year of delivery, the one who has paid for the item in advance may choose whether to wait until the fruits are available, or he may ask for annulling the contract and ask for the money he has paid. This is because in case the contract is annulled, it is obligatory for the seller to repay the price paid in advance. If the payment given by the buyer against the sold item is damaged, a compensation for it must be paid. And Allah, Exalted be He, knows best.

In fact, allowing such a kind of transactions is a sign of the facilitation and benevolence by which our *Sharî'ah* is characterized. This is because the *salam* facilitates many things for people and helps them do what benefits them. Besides, the *salam* does not involve *ribâ* or the like of other forbidden transactions. All praise is due to Allah for the facilitation He grants.

Endnotes

1 Al-Hâkim (3189) [2/342], Al-Bayhaqi (11081) [6/30] and 'Abur-Razzâq (14064) [8/5].
2 Al-Bukhâri (2239) [4/540] and Muslim (4094) [6/42]. See also Al-Bukhârî (2253) [4/457].
3 See: "*Al-Ijmâ'* " [p. 54]
4 Ahmad (15253) [3/402] and An-Nasâ'î (4610) [7/329].
5 *Hawâlah*: The transference of a debt from the liability of the debtor to the liability of another person.

CHAPTER

11

Loaning and Loans

The loan means paying an amount of wealth to someone who wants to benefit from it, and then he pays it back later. This is considered a kind of utility so the Prophet (PBUH) calls it *mani<u>h</u>ah*[1 2] as the borrower benefits from it and then pays it back to the lender.

Lending is desirable and is greatly rewarded by Allah, as the Prophet (PBUH) says:

> *"No Muslim lends a loan to another Muslim twice but it will be like giving it once in charity."*
>
> (Related by Ibn Mâjah)[3]

It is said that lending a loan is legally better than giving charity, as none borrows except when being in a bad need. In a *sa<u>h</u>i<u>h</u>* (authentic) *<u>h</u>adith*, the Prophet (PBUH) says:

> *"He who relieves a Muslim from hardship Allah will relieve him from the hardships (to which he would be put) on the Day of Resurrection."*[4]

So, lending is considered a good deed as it relieves a Muslim from hardship and meets his bad need. Hence, borrowing is not a detestable act, for it happened that the Prophet (PBUH) borrowed. This is related and stated in many *hadîths* about the Prophet (PBUH)[5].

Moreover, the loan must be from someone whose loan is legal (valid); it is impermissible for the guardian of an orphan, for example, to take from the orphan's money in order to lend others. The amount and quality of the loan must be known and defined in order to make the receiver able to pay it back. A loan is considered a debt upon the liability of its receiver, and then he has to return it, without delay, as soon as he can afford it.

In addition, it is prohibited upon the lender to stipulate any increase to his loan. Scholars unanimously agree that if the lender stipulates any increase and takes it, it is considered *ribâ*. Nowadays, banks lend money stipulating an interest on money, which is plain *ribâ*, whether the loan is the so-called consumer or developmental loan. It is impermissible for the lender (a bank, a person, or a company) to take a stipulated increase regardless of the name given to it (profit, interest, gift), or to make use of a utility against the loan such as staying in a house or using a car. As long as this profit, gift, or utility is obtained through stipulation, it is considered impermissible. The Prophet (PBUH) says:

"Any loan that brings a profit is (a kind of) ribâ."[6]

Anas (may Allah be pleased with him) narrated that the Prophet (PBUH) said:

"If anyone of you gives a loan (to somebody) and there is a gift presented to him or he is asked to be carried on the mount (of the borrower), he should not ride on it nor should he accept the gift except if that used to happen between them (the lender and the borrower) before."

(Related by Ibn Mâjah as a *marfû'* (traceable) *hadîth*)[7]

There are many similar narrations of this *hadîth*.

Furthermore, it is related about 'Abdullâh Ibn Salâm (may Allah be pleased with him) that he said:

"If someone indebted to you gives you a load of hay as a gift, do not accept it, for it is ribâ."

This tradition is viewed by scholars as a *hadîth* narrated about the Prophet (PBUH). Thus, it is impermissible for the lender to accept a gift or any form

of utility from the debtor. Such a profit is prohibited since lending is supposed to be a kind of leniency on behalf of the Muslim lender towards the needy debtor, and also a means to draw near to Allah. So, if the lender stipulates or anticipates a profit, then he violates the aim of lending; that is to draw near to Allah through relieving the needy instead of seeking a profit from him, as it will not be considered a good loan.

Therefore, Muslims must avoid such transactions that may involve *ribâ*. Moreover, they must have good intentions, as regards giving loans and doing other good deeds. That is, the purpose of giving loans is not directed to material gains; rather, it is a means of gaining a moral benefit through drawing near to Allah. This can be attained by relieving the needy without gaining any profit. If a Muslim lender intends to relieve the needy, Allah will bless his money.

It is worth mentioning that the prohibited profit is the stipulated one. For example, the lender may stipulate that he gets back his money with such and such amount of money as due interest, makes use of a house or a shop of the borrower, or gets a gift from him. It is also forbidden that the lender intends or anticipates taking an increase even if he does not stipulate such an increase. However, if there is some increase given to the lender simply as an act of showing kindness from the borrower not by means of stipulating, there is no harm in that as it is considered of the better ways of repaying loans. Once, the Prophet (PBUH) gave a choice camel in return for a small camel that he had received as a loan. Then he (PBUH) said:

"The best amongst you is he who pays the rights of others handsomely."[8]

According to the *Sharî'ah* (Islamic Law) and common convention, paying the rights of others handsomely is among the good manners and it is not among the prohibited loans that beget benefits as long as such an increase is neither stipulated nor anticipated by the lender, but it is simply a donation from the borrower. Likewise, it is permissible for the lender to accept a benefit which the borrower used to give him before the loan as long as it is not given to him because of the loan.

The borrower must pay back the loan without procrastination or delay as soon as he is able to afford it. Allah, Exalted be He, says:

"Is the reward for good [anything] but good?"

(Qur'ân: Ar-Rahmân: 60)

However, some people are remiss in giving the rights of others especially debts. This is a bad manner that has made many people abstain from lending the needy and relieving them. Thus, the needy Muslim may become obliged to borrow from the usurious banks and commit what Allah prohibits since he finds no one ready to give him a good loan and the lender finds no one trustworthy to repay him on due time. This leads to the absence of kindness among people.

Endnotes

1 The word *manihah* in Arabic indicates something gifted to be made use of then returned to its owner.
2 Muslim (3938) [5/452].
3 Ibn Mâjah (2430) [3/153].
4 Al-Bukhâri (2442) [5/121] and Muslim (6793) [9/23].
5 Al-Bukhâri (2305) [4/608] and Muslim (4086) [6/38].
6 Al-Bayhaqi (10933) [5/573].
7 Ibn Mâjah (2432) [3/154].
8 Al-Bukhâri (2305) [4/608] and Muslim (4088) [6/39].

CHAPTER

12

Mortgage

Mortgaging refers to the security for a debt against an article that can cover it or its value (in case of non-fulfillment).

Mortgaging is permissible according to the Noble Qur'ān, the *Sunnah* (Prophetic Tradition) and the consensus of Muslim scholars. Allah, Exalted be He, says:

> ***"...And if you are on a journey and cannot find a scribe, then a security deposit [should be] taken..."***
>
> (Qur'ān: Al-Baqarah: 283)

When the Prophet (PBUH) died, his armor had been mortgaged[1]. Scholars unanimously agree that mortgaging is permissible on journeys and the majority of scholars maintain that mortgaging is also permissible in residence. The wisdom behind the legality of mortgaging is to keep properties and protect them against loss.

Allah, Exalted be He, commands Muslims to write down the debts as He says:

> ***"O you who have believed, when you contract a debt for a specified term, write it down..."*** (Qur'ān: Al-Baqarah: 282)

And He says:

> ***"And if you are on a journey and cannot find a scribe, then a security deposit [should be] taken..."***
>
> (Qur'ān: Al-Baqarah: 283)

Such permissibility is considered of the mercy of Allah upon His servants as He guides them to what benefits them.

The amount, quality, and description of the collateral must be known. The debtor must be legally permitted to contract; he must possess the collateral or have permission to deal conclusively with it. Man is permitted to mortgage his own property for the debt of another. The collateral must be a property valid for selling in order to enable the creditor to make use of it in case of non-fulfillment.

It is permissible to stipulate the collateral in or after concluding the contract as Allah says:

> ***"And if you are on a journey and cannot find a scribe, then a security deposit [should be] taken..."***
>
> (Qur'ān: Al-Baqarah: 283)

Thus, Allah, Exalted be He, has made the stipulation of the collateral a substitute for writing the contract of debt, which is written after the debt becomes in effect and obligatory to be settled by the indebted person.

The collateral is obligatory to be given by the debtor, as he owes the creditor who is not obliged to accept the collateral and is permitted to cancel the mortgaging contract as he alone has a right to claim it. It is permissible for the debtor to mortgage his share of a property owned by him and others because he is permitted to sell his share to pay back his debt.

It is permissible to mortgage the purchased article for its price, as this price is a liability on the debtor, i.e. the mortgagor, and the purchased article is possessed by him, so he can mortgage it. For example, if someone

buys a house or a car on credit or in cash but the price is not paid yet, he is permitted to mortgage it so as to pay its price to the seller. However, neither the debtor nor the creditor is permitted to dispose of the collateral except after getting the permission of the other. If either of them disposes of the collateral, he causes a loss to the other. That is, if the debtor disposes of the collateral without the creditor's permission, he deprives him from securing the deal. Similarly, if the creditor disposes of the collateral (without the debtor's permission), he will be disposing of a property that does not belong to him.

Concerning making use of the collateral, it is to be according to what the two parties (the debtor and the creditor) agree on. So, if they agree on renting or concluding any other transactions with regard to the collateral, it will be permissible. However, if they do not agree (to make use of the collateral), the collateral remains suspended until it is redeemed. The debtor is to be made able to maintain and keep the collateral; for example, watering, pollinating, and treating the trees, as this is done for the benefit of the collateral.

The earnings received from the collateral whether by itself (such as an animal when it becomes fatter or is able to do some work) or through its product (such as offspring, wool and whatever is begotten from it) are considered part of the collateral that can be sold with the collateral for fulfilling the debt. The same ruling applies to the crops of a mortgaged land. Besides, if there is any damage caused to the collateral, the compensation for this damage is to be joined to the collateral, as it is a substitute for part of it.

The debtor must provide the expenditures of the collateral. This is because Sa'îd Ibnul-Musayyab reported on the authority of Abû Hurayrah (may Allah be pleased with them) that the Prophet (PBUH) said:

> "*When someone mortgages an item, it is not to be foreclosed; any increase in its value goes to him and any loss or liability must be borne by him.*"
>
> (Related by Ash-Shâfi'î and Ad-Dâraquṭnî who grades it as having a good and authentic chain of transmitters)[2]

This is because the collateral is the property of the debtor and it is his responsibility to provide whatever it requires for its maintenance. Also, it is the responsibility of the debtor to pay the rent of the store where the collateral is kept, the wages of guarding it, and the wages of grazing the mortgaged cattle.

If part of the collateral is damaged, the rest is legally considered collateral for the whole debt as the debt is guaranteed by the whole collateral, and as long as part of the collateral is damaged, then the rest is collateral for the whole debt.

If the debtor pays back part of the debt, no part of the collateral is to be redeemed until the debtor pays the whole debt.

When the debt is due, the debtor must pay back the whole debt to comply with the contract, whether he has given a collateral or not. Allah, Exalted be He, says:

> "*...then let him who is entrusted discharge his trust [faithfully] and let him fear Allah, his Lord...*" (Qur'ān: Al-Baqarah: 283)

And He also says:

> "*...and not leave anything out of it...*"
>
> (Qur'ān: Al-Baqarah: 282)

If the debtor abstains from paying back the debt to the creditor, he is considered a procrastinator and then the judge is to oblige him to pay back the debt. However, if the debtor still refuses to pay back the debt, the judge must imprison and effect discretionary punishment on him until he pays back the debt. Then, if he does not pay back the debt, the judge is to sell the collateral and pay back the debt. The judge must behave on behalf of the debtor when the latter refuses to pay back, since such a debt is an obligation on the debtor and the collateral is a mere guarantee for the debt to be returned when due. If some money remains after paying back the debt, it must be given to the debtor as it belongs to him. Yet, if the money of the sold collateral does not cover the debt, the rest of the debt is still on the credit of the debtor and he has to return it.

If the collateral is an animal which needs expenditures and is kept by the creditor, the wise Lawgiver permits him to ride it, if it is a riding animal, and to milk it, if it is a milch animal, provided that he provides the expenditures. The Prophet (PBUH) says:

> "*The mortgaged animal can be used for riding as long as it is fed, and the milk of the milch animal can be drunk according to what one spends on it. The one who rides the animal or drinks its milk should provide the expenditures.*"
>
> (Related by Al-Bukhāri)[3]

So, whoever rides the animal or drinks its milk must provide the expenditures in return for his making use of it. Any other utility gained from this animal belongs to its owner, the debtor.

Ibnul-Qayyim (may Allah be pleased with him) says:

> *"The hadith as well as the general principles and the original rules of the Shari'ah (Islamic Law) indicate that the Muslim must take care of the mortgaged animal in order to observe the orders of Allah. Moreover, the owner of such an animal has the right of ownership and the mortgagee has the right to guarantee his own property (by keeping the collateral). If the mortgagee keeps the animal and neither rides nor milks it, he misses his right to make use of it. Thus, depending on justice, analogical deduction, as well as the interests of the mortgager, mortgagee, and the mortgaged animal, the mortgagee is permitted to ride and milk the mortgaged animal in return for his providing its expenditures. When the mortgagee lawfully makes use of the mortgaged animal and provides the expenditures, this satisfies the interests of both the mortgager and mortgagee and keeps their rights."*[4]

Some of the *faqihs*[5] (may Allah have mercy on them) maintain that there are two categories of collaterals: The first needs expenditures while the second does not. The first category of collaterals is divided into two subcategories. The first is the animal that can be ridden or milked whose ruling has been explained above. The second subcategory is not to be ridden or milked such as the male or female slave. The mortgagee is not permitted to make use of this kind of collaterals except with the permission of the mortgager. So, if the owner of the slave permits the mortgagee to make use of the slave provided that the mortgagee provides the expenditures, then it is permissible, as this is considered a sort of compensation. The second category of collaterals is the kind that does not need expenditures, such as a house, belongings, and the like. The mortgagee is permitted to make use of this kind of collaterals with the permission of the mortgager except when this collateral guarantees a loan, for it is prohibited to gain any interest out of a loan as we previously explained that it is a kind of *ribâ*.

Endnotes

1 Al-Bukhâri (2915) [6/121]. See also Al-Bukhâri (2068) [4/382] and Muslim (4090) [6/40].
2 Ad-Dâraqutni (2897) [3/29] and Al-Bayhaqi (11211) [6/65]. See also Ibn Mâjah (2441) [3/161].
3 Al-Bukhâri (2512) [5/177].
4 See the footnotes in "*Ar-Rawd Al-Murbi'*" [5/91].
5 *Faqih*: A scholar of Islamic Jurisprudence.

CHAPTER

13

Guarantee

Guarantee is one of the legal ways to record debts. In Islamic terminology, it is the guarantor's commitment to pay back the debt of another person while this person is still considered the original debtor. In this case, the guarantor must fulfill the obligations of the debtor. For example, the guarantor may say to the creditor, "I guarantee the debt of so and so." Guarantee is permissible according to the Noble Qur'ân, the *Sunnah* (Prophetic Tradition), and the consensus. Allah, Exalted be He, says:

> "...***and for he who produces it is [the reward of] a camel's load, and I am responsible for it.***" (Qur'ân: Yûsuf: 72)

The word "***responsible***" implies that this person is a guarantor.

Imâm At-Tirmidhî relates, as a *marfû'* (traceable) *hadîth*, that the Prophet (PBUH) says:

> "*The guarantor is responsible for (paying) the thing he guaranteed.*"[1]

Scholars unanimously agree that guarantee is generally permissible. The interests and needs of people necessitate the permissibility of a guarantee, as it is a means of cooperation in righteousness and piety so as to relieve Muslims from difficulties.

In order to maintain the validity of the guarantee, the guarantor must be legally permitted to dispose of his assets since guarantee is a form of financial obligation. So, a child or a weak-minded interdicted of his legal capacity is not permitted to be a guarantor. Moreover, the guarantor must accept (willingly) to bear this liability, and if he is forced to do so, then the guarantee becomes void. Since liability is a voluntary declaration to fulfill an obligation, a guarantor's consent is obligatory, as is the case of financial donation.

Furthermore, guarantee is a kind of benevolence to benefit and help the guaranteed person, so it is impermissible to take compensation out of it. That is, compensation resulting from guarantee is as prohibited as a benefit resulting from a loan. The guarantor must pay the debt on behalf of the guaranteed person when time is due for the creditor to ask for it. When the guarantor pays the debt, he is permitted afterwards to take back the same amount of money from the guaranteed person without any interest, since guarantee is legally intended to show leniency and help the needy, not to exploit and place burdens upon them.

Guarantee is valid when the guarantor gives his consent by whatever words indicate this, such as "I am responsible for this debt," "I guarantee this debt," "This debt is on my liability," and the like, since the Lawgiver[2] does not necessitate a specific phrase to be said and it depends on the common convention of the society.

The creditor has the right to ask the guarantor or the guaranteed person to get his money back as it is a debt on the liability of both of them. The Prophet (PBUH) says:

> *"The guarantor is responsible for (paying) the thing he guaranteed."*
>
> (Related by Abû Dâwûd and At-Tirmidhî who grades it a *hasan* (good) *hadîth*)[3]

This is the opinion of the majority of scholars. However, some scholars are of the opinion that the creditor has no right to ask the guarantor to pay him except when it is difficult to ask the guaranteed person for the debt. This is because a guarantor is legally considered subsidiary to the original debtor, and he is not to be asked for anything except when it is impossible to get the debt

from the debtor. Guarantee, like mortgaging, is a way to guarantee the right of the creditor; the collateral is not to be taken by the mortgagee except when the mortgager cannot pay back the debt at its due time. It is not acceptable to ask the guarantor for the debt as long as the guaranteed person can be found and is able to pay. According to common convention, the creditor asks the guarantor for the debt only when the guaranteed is not found or when he is unable to pay it back. This is the meaning implied by **Ibnul-Qayyim** who concludes, "...*This is the preponderant view as you see.*"[1]

The liability of the guarantor is not absolved until the liability of the guaranteed person is discharged whether by paying back his debt to the creditor or by being excused by him.

Moreover, it is permissible for the debtor to have a number of guarantors whether every guarantor claims liability on the whole debt or on only part of it. However, the responsibility of each of the guarantors is not absolved until the responsibilities of all of them are discharged or when the responsibility of the guaranteed person is absolved. It is not necessary for the guarantor to know the guaranteed person to make his guarantee valid. The guarantor can simply say to the creditor, "I guarantee the person who is indebted to you." Likewise, it is not necessary for the guarantor to know the creditor as the consent or knowledge of either the creditor or the guaranteed person is not necessary to make the guarantee valid. In addition, it is permissible to guarantee a known amount or an unknown amount if it is to be known afterwards, as Allah, Exalted be He, says:

> ***"...and for he who produces it is [the reward of] a camel's load, and I am responsible for it."*** (Qur'ân: Yûsuf: 72)

This is because a camel's load is unknown at first but then becomes known. This verse implies the permissibility of guaranteeing a known amount or an unknown amount if it is to be known afterwards.

It is permissible for the guarantor to bear the seller's responsibility if the commodity turns out to be possessed by someone else. Also, it is permissible for a Muslim person to guarantee the obligations of someone else, such as paying back his debt and the like.

Endnotes

1 Ahmad (22195) [5/267], Abû Dâwûd (3565) [3/527], At-Tirmidhi (2125) [3/433] Ibn Mâjah (2405) [3/141].

2 The Lawgiver of *Sharî'ah* (Islamic Law) is Allah, Exalted be He; the term can also refer to the Prophet (PBUH) as he never ordained but what was revealed to him by Allah.

3 *Hasan* (good) *hadith* is a *hadith* whose chain of transmission is linked to the narration of an authority with weak exactitude, and the *hadith* is free from eccentricity or blemish.

4 See: "*I'lâm Al-Mûwaqqi'in*" [3/411].

CHAPTER 14

Suretyship (*Kafâlah*)

Suretyship (*Kafâlah*) is one's commitment to present the indebted person to the creditor. So, suretyship concerns the guaranteed person himself and it is valid for anyone in debt. No suretyship is permissible for prescribed punishments because suretyship depends on certainty while prescribed punishments are not to be executed when combined with suspicious proofs. In addition, suretyship does not apply in a case of legal retribution as it is to be executed only on the offenders. It is impermissible to execute legal retribution on a surety when the one guaranteed cannot be found.

The surety must give his consent in order to make suretyship valid, as he is not obliged to bear the responsibility of suretyship. The obligation of the surety is legally absolved if the guaranteed person dies. Likewise, the surety is legally absolved when the guaranteed person submits himself before the creditor at the due time and place since he then fulfills the obligation of the surety. However, if the surety cannot present the guaranteed person at the due time or if the guaranteed person has been absent for a long period during

which he could have been presented, then the surety must guarantee the debt. This is according to the general meaning of the Prophetic *hadith* in which he (PBUH) says:

> *"The guarantor (here the surety) is responsible for (paying) the thing he guaranteed."*[1]

It is permissible to guarantee the acquaintance of a person. For example, a person comes to borrow money from another and the latter says, "I do not know you, so I will not lend you", then a third person says, "I guarantee my acquaintance of him to you" meaning "I know who he is and where he lives". In such a case, the surety (who guarantees the acquaintance of the guaranteed person) is not only required to mention the name and address of the guaranteed, but he must also present him to the creditor. If the guaranteed person is alive and the surety cannot present him to the creditor, the surety must guarantee the debt (pay it back) as he is the one who has guaranteed the acquaintance of the debtor (the guaranteed person) and persuaded the creditor to lend him. Such an acquaintance is like saying, "I guarantee to present the debtor to you whenever you want."

Endnotes

1 Ahmad (22195) [5/267], Abû Dâwûd (3565) [3/527], At-Tirmidhî (2125) [3/433] and Ibn Mâjah (2405) [3/141].

CHAPTER 15

Hawâlah (Transference of Debts)

The *faqihs* define *hawâlah* as the transference of a debt from the liability of the debtor to the liability of another person. The transference of debts is permissible and approved by the *Sunnah* (Prophetic Tradition) and the consensus. The Prophet (PBUH) says:

> *"If the debt of one of you is transferred (from your debtor) to a rich debtor, he should agree."*[1]

The same *hadith* is narrated with a slight difference in wording as:

> *"Whoever is transferred (from his debtor) to a rich debtor, should agree."*[2]

Many scholars maintain that there is a consensus on the permissibility of the transference of debts. The transference of debts is a kind of leniency legally intended to facilitate the transactions of people and help them meet their needs, pay back their debts and be comfortable.

Some people think that the permissibility of the transference of debts does not accord with analogical deduction. They allege that it is a kind of selling a debt for another debt, which is forbidden. However, the great scholar **Ibnul-Qayyim** argues against this opinion and affirms that the permissibility of the transference of debts is not an exception as it is a kind of paying back debts not of selling. He says:

> *"Even if the transference of debts is a kind of selling a debt for another, the Lawgiver does not prohibit it since the principles of the Sharî`ah (Islamic Law) necessitate the permissibility to transfer a debt from the liability of the original debtor to the liability of a new one (substitute debtor)."*[3]

There are some legal conditions on the transference of debts to make it valid. They are as follows:

First: The debt must be under the responsibility of the substitute debtor since the transference of debts obliges the substitute debtor to pay the debt back. If the debt is not yet determined to be under the responsibility of the original debtor, its transference is not valid as it can be canceled. For example, it is not legal to transfer the price of a purchased article as long as it is still subject to approval. Also, a son cannot transfer his debt to the credit of his father unless his father gives his consent.

Second: The substitute debt must be identical to the transferred debt with regard to the kind, e.g. dirhams for dirhams. Likewise, the substitute debt and the transferred debt must be equal with regard to the description, e.g. Saudi currency for Saudi currency. Also, the two debts must have the same time for due payment; whether they are to be paid in cash or on credit. That is, the transference of debts is not valid if one debt is paid in cash and the other is on credit, or if the due time of one debt is after a month while the time of the other is after two months. Besides, the amounts of the two debts must be the same; it is impermissible to transfer a debt of one hundred riyals, for example, for another debt of only ninety riyals. This is because the transference of debts, like lending loans, is intended to be a kind of leniency not a means to gain profit. Hence, if there is any difference in the value between the two debts, this will violate the legal objective of the transference of debts, which is leniency, and set instead the objective of gaining interests which is impermissible in the transference of debts

and in lending loans. However, it is permissible for the original debtor to transfer only part of his debt to the credit of a substitute debtor, or to transfer his debt to the credit of someone owing him more than the original debt, and the remaining debt in each case is still due for its creditor.

Third: The consent of the original debtor is necessary here, as he is not obliged to pay back his debt through transference. However, the consent of the creditor is not necessary. Also, the consent of the creditor is not necessary in order to transfer the debt to the credit of a rich person who is not procrastinating. Rather, such a creditor must be forced to accept the transference of the debt and then he has the right to claim his loan from the substitute debtor. The Prophet (PBUH) says:

"Procrastination (delay) in paying debts by a wealthy person is injustice. So, if the debt of one of you is transferred (from your debtor) to a rich debtor, he should agree."

(Related by Al-Bukhârî and Muslim)

In another narration of this *hadîth*, the wording is:

"Whoever is transferred (from his debtor) to a rich debtor, should agree."

This means that the creditor should agree on the transference of his debt. If the substitute debtor is not able to fulfill the debt or may procrastinate, then the creditor is not obliged to agree to the transference of the debt to that person as this may damage his interests.

In this respect, the indebted persons who are able to pay back should hasten to be absolved by paying back their debts to the original creditors or the substitute creditors for whom the debt becomes entitled through transference. The indebted persons should not ruin their reputations through procrastination. Often, we hear the creditors' complaints when they suffer from the illegal delay and negligence of the debtors in paying back their debts. Also, we frequently hear the creditors' complaints owing to the procrastination of the rich substitute debtors in paying back their due transferred debts, since they cause a lot of difficulty to the creditors. This has made the transference of debts a repulsive matter which many people dislike because of the injustice of the substitute debtors.

When the transference of debts meets its aforementioned legal conditions, the debt transfers from the liability of the original debtor to the liability of a substitute debtor, and the original debtor becomes absolved. This is because the transference of debts means the transference from one liability to another. Thus, the creditor is not permitted to claim his right from the original debtor; rather, he has to refer to the substitute debtor in order to get back his right or reach an agreement with him. Therefore, the legal transference of debts is a permissible way to pay back the debts, as it makes things easy for people when they make use of it in a good manner without deception or procrastination.

Endnotes

1 Al-Bukhâri (2287) [4/585] and Muslim (3978) [5/471].
2 Mentioned in the book entitled "*Al-Fath*" [5/587].
3 See: "*I'lâm Al-Mûwaqqi'in*" [1/380].

CHAPTER

16

Commissioning (*Wakâlah*)

In Islamic terminology, *wakâlah* (commissioning) refers to the act in which a legally accountable person appoints another legally accountable person to act on his behalf in a certain matter in which such authorization is permissible. Commissioning is permissible according to the Noble Qur'ân, the *Sunnah* (Prophetic Tradition), and the consensus of Muslim scholars. Allah, Exalted be He, says:

"...So send one of you with this silver coin of yours to the city..."

(Qur'ân: Al-Kahf: 19)

And He says:

"[Joseph] said, 'Appoint me over the storehouses of the land...' "

(Qur'ân: Yûsuf: 55)

And He also says:

"...and for those employed to collect [Zakâh]..."

(Qur'ân: At-Tawbah: 60)

Moreover, the Prophet (PBUH) authorized 'Urwah Ibnul-Ja'd to buy a ewe,[1] authorized Abû Râfi' to perform the marriage contract on his behalf with Maymûnah,[2] and used to send his men to collect *Zakâh*. In addition, Al-Muwaffaq and other scholars maintain that there is a consensus on the permissibility of commissioning. The wisdom behind this permissibility is that people's needs necessitate the legality of commissioning since not every person can do himself whatever he needs.

What is Required in Order to Make Commissioning Valid and Confirmed

Commissioning is confirmed by any statement that indicates permission for it (e.g. "Do so and so" or "I permit you to do so and so"). It is permissible to accept commissioning instantaneously or to defer it. This is due to the fact that the Prophet's representatives deferred their acceptance when he (PBUH) commissioned them. Furthermore, commissioning can be timed or conditioned. For example, the authorizer may say to the representative, "You will be my representative for one month" or "When the lease period of my house expires, you can sell it."

The authorizer must designate a particular person, so commissioning becomes void if the authorizer says, "I authorize anyone of these two persons to be my representative." Also, commissioning becomes void if the authorizer appoints someone whom he does not know.

Matters in Which Commissioning is Permissible

It is permissible for a person to commission another in matters in which representation is permitted, such as concluding or canceling all kinds of contracts. To clarify, selling, buying, renting, lending loans, and speculating are examples of concluding transactions, while divorce, *khul'* (the wife's release for payment), emancipation, and cancellation of the sale are examples of canceling the transactions.

Commissioning is also permissible in the matters relating to Allah's rights (some acts of worship) in which authorization on behalf of someone is permissible. This is like the distribution of *Zakâh* and charity, fulfillment of vows, expiation, and performing *Hajj* and *'Umrah* (Lesser Pilgrimage), according to the related authentic proofs in this regard. However, designating a representative is not permissible in the matters relating to individual acts of worship, in which authorization on behalf of someone is not permissible,

such as performing prayer, fasting, and the purification of major and minor ritual impurities, since these acts of worship are to be observed by the legally accountable person himself.

In addition, commissioning is permissible in investigating and executing the prescribed punishments as the Prophet (PBUH) said:

> *"O Unays! Go to the wife of this (man) and if she confesses (that she has committed adultery), then stone her to death."*
>
> (Related by Al-Bukhārī and Muslim)[3]

The authorized (commissioned) person has no right to designate another representative to act on his behalf except in the following matters:

First: When the authorizer permits the authorized person to do so by saying something like, "You can designate a representative to act on your behalf if you like) or (Do as you like)."

Second: If the designated act is not to be carried out by the authorized person, as he is an honorable person who is far above doing such an act.

Third: If the authorized person is unable to carry out the designated work.

Fourth: When the authorized person cannot do the designated work properly.

In the aforementioned four cases, it is impermissible for the authorized person to designate anyone except a trustworthy representative.

Commissioning is permissible for both the authorizer and the authorized person as it is considered permission given by the authorizer and a service rendered by the representative, but both are not obligatory; each of the authorizer and authorized person is permitted to cancel commissioning at any time he desires.

Matters Nullifying Commissioning

Commissioning is nullified by cancellation, death, or absolute madness with regard to either of the parties. This is because commissioning depends on the life and sanity of both parties, so when one party lacks either of them, it becomes invalid. Commissioning also becomes invalid if the authorizer discharges the authorized person, or when either of them is interdicted of his legal capacity due to his foolishness, (since he then lacks the authority of disposition).

When Commissioning Becomes Permissible

Whoever has the authority to dispose of something can authorize or be authorized in regard to this same thing. However, whoever has no legal authority to dispose of something, his representative has not the authority to dispose of this same thing, with greater reason. A representative who is authorized for buying and selling is not permitted to sell or buy from himself as the customs necessitate that a person sells and buys from others not from himself lest he should be suspected. Likewise, he is not permitted to sell or buy from his son, father, wife or those whose testimony in his favor is to be rejected because there is suspicion of favoritism and partiality due to family relations.

Actions Related to the Authorizer and the Authorized Person

The authorizer must fulfill some legal commitments with regard to transactions, such as delivering the price, receiving the purchased article, canceling transactions for defects, asking for his rights and guaranteeing the rights of the other party. As for the authorized person who is authorized for selling, he may deliver the purchased article but he is not permitted to receive the price without the permission of his authorizer or at least a situation indicating his permission. For example, the authorized person may receive the price if he sells the article in a store where the price may be lost if he does not receive it. An authorized person who is authorized for buying may deliver the due price to complete the transaction. However, the person authorized for settling a dispute is not permitted to receive the price, but the person authorized for receiving the price is permitted to settle the dispute as it is the only way to receive the price.

Commitments of the Representative

The authorized person is accountable. But, he is not liable for things that are lost or damaged with him as long as he does not neglect or exceed limits with regard to such items. However, if he neglects, exceeds limits or refuses, without any legal excuse, to pay the money due for the authorizer, he is to be liable for what is lost or damaged and legally obliged to pay any money due to the authorizer. The authorized person is to be trusted with regard to the designated work whether it is selling, renting, or the like. In other words, what he says about the price, the rent, or the damaged articles is to be trusted and believed. And Allah knows best.

Endnotes

1 Al-Bukhârî (3642) [6/772].
2 At-Tirmidhî (841) [3/200].
3 Al-Bukhârî (2314) [4/619] and Muslim (4410) [6/204].

CHAPTER

17

Interdiction

Islam has been ordained to protect the properties and rights of people; therefore, interdiction has been legalized on ones who should be prevented from disposing of their properties.

Jurisprudentially speaking, interdiction means preventing someone from disposing of his property. What proves that interdiction is legalized is that Allah, Exalted be He, says in the Noble Qur'ân:

> ***"And do not give the weak-minded your property, which Allah has made a means of sustenance for you, but provide for them with it and clothe them and speak to them words of appropriate kindness. And test the orphans [in their abilities] until they reach marriageable age. Then if you perceive in them sound judgment, release their property to them..."*** (Qur'ân: An-Nisâ': 5-6)

These two verses prove that Allah, Exalted be He, has decreed interdiction on the weak-minded and the orphans lest they should waste or destroy their properties. Moreover, both are not to be given back their property except when they become of sound judgment. The Prophet (PBUH) himself interdicted some of his Companions (and has sold some of their properties) to settle their debts[1].

Interdiction Is of Two Types

The First Type of Interdiction is the one imposed for safeguarding others' share in the property of the interdicted person, as the case of interdicting the insolvent person for safeguarding the share of the creditors in his existing property. For safeguarding the share of the heirs in the heritage, interdiction is also imposed on the sick person to prevent him from bequeathing more than the third of his property.

The Second Type of Interdiction is the one imposed on the person for his own benefit, lest he should waste his property or destroy it. Interdiction in this case applies to the minor, the weak-minded and the insane, for Allah, Exalted be He, revealed:

> ***"And do not give the weak-minded your property..."***
>
> (Qur'ān: An-Nisā': 5)

Some scholars maintain that those meant in this verse are the young children and women, thus the guardian should not wastefully give them of his money. Other scholars are of the opinion that those meant in the verse are the weak-minded, the young children and the insane persons; they are to be denied the right to dispose of their properties lest they should waste them. Allah, Exalted be He, makes the property – in the above-mentioned verse – attached to the addressees "***...your property...***" since they are appointed as guardians of the property of the interdicted to protect it.

The First Type: Interdiction for Safeguarding Others' Share

This type of interdiction applies to the bankrupt, whose remaining property is insufficient (when sold) to meet all his due debts. Thereupon, he is to be denied the right to dispose of his remaining property lest he should cause harm to his creditors. As for the insolvent debtor who is unable to fulfill any of his debts, he is not to be asked (by his creditors) to pay them, but should rather be granted a grace period until his financial circumstances allow him to pay. With regard to this, Allah, Exalted be He, says:

> ***"And if someone is in hardship, then [let there be] postponement until [a time of] ease..."*** (Qur'ān: Al-Baqarah: 280)

Regarding the favor and reward of granting a grace period for the insolvent person, the Prophet (PBUH) says:

"He who is pleased to be granted shade by Allah under the shade granted by Him (on the Day of Resurrection) should relieve an insolvent person."

Yet, discharging the insolvent person is better than granting him a grace period, in consideration of what Allah, Exalted be He, says:

"...But if you give [from your right as] charity, then it is better for you..." (Qur'ân: Al-Baqarah: 280)

As for the debtor who is able to settle his debts, it is impermissible to interdict him, since there is no need for that. However, if his creditors ask him to pay what he owes them, he is to be legally ordered to pay his debts, for the Prophet (PBUH) says:

"Procrastination in paying debts by a wealthy man is injustice."[2]

This *hadîth* signifies that when an indebted wealthy person procrastinates in paying his debts, he is thus causing injustice to his creditors since he refuses to pay what he owes them. If the indebted wealthy person refuses to pay his debts, then he should be imprisoned. In this regard, **Sheikh Taqiyyud-Din Ibn Taymiyah** (may Allah have mercy on him) said:

"...As for the person who is able to meet his debts and (though) refuses (to pay them), he is to be legally forced to pay by means of beating or imprisoning him. This is also the view of the followers of Mâlik, Ash-Shâfi`î, Ahmad and other scholars."

He added:

"...It has not come to my knowledge that there is a disagreement among scholars in this concern."[3]

In addition, Imâm Ahmad, Abû Dâwûd and other compilers of *Hadîth* relate that the Prophet (PBUH) says:

"Procrastination in paying debts by a wealthy man makes it permissible to be dishonored (by the creditor) and to be punished (by the judge)."[4]

The word "be dishonored" means to be complained about (by his creditors), and "be punished," means to be imprisoned. The person procrastinating in paying his debts deserves discretionary punishment and imprisonment. He is

to be repeatedly punished in this manner until he fulfills his debts. In case the debtor insists on delaying his debts, those in authority are to intervene and sell his property to pay the debts he owes. This is because those in authority are to take the place of the person who refuses to pay his debts, in order to prevent any harm to the creditors. This is according to the *hadîth* in which the Prophet (PBUH) says:

> *"One should not harm others nor should one seek benefit for oneself by causing harm to others."*[5]

From what has been demonstrated, it appears that there are two states of the debtor:

The first state is when his debt is deferred. Thereby, he is not to be asked to pay it until it is due, nor is he obliged to settle it before that. In case the debtor's property is insufficient to meet his deferred debt, he is not to be interdicted nor be denied the right to dispose of his property.

The second state of the debtor is when his debt is due. In this state, there are two other cases of the debtor:

The first case is when the value of the debtor's property exceeds his payable debt, in which case he is not to be interdicted, but rather be ordered to pay his debt when the creditors ask for that. If the debtor refuses to pay (upon the creditor's demand), he is to be punished with a discretionary punishment and imprisoned until he pays his debts. If the debtor bears both punishments but still refuses to pay, those in authority are to intervene by selling from his property what suffices to cover the debts.

The second case is when the value of the debtor's property is less than his due debt; in this case, he is to be interdicted if his creditors ask for their money lest he should cause harm to the money he owes them. This is according to the *hadîth* narrated by Ka'b Ibn Mâlik (may Allah be pleased with him) which states:

"The Messenger of Allah (PBUH) interdicted Mu'âdh and sold his property (to fulfill the debts Mu'âdh owes)."[6]

(Related by Ad-Dâraqutni and Al-Hâkim and the latter deems it a *sahîh* (authentic) *hadîth*)

Ibnus-Salâh says, *"This hadîth is surely reported about the Prophet (PBUH)."* In this case, if the debtor is interdicted, it is to be publicly declared lest people should be deceived by him (in financial transactions), causing their property thus to be wasted.

There are Four Rulings on the Interdicted Person

The first ruling is that his debts are to be paid from his property before being interdicted, and from whatever property that comes to his possession afterwards, such as the money he obtains by means of legacy, an injury compensation, a gift, a share from a will and the like. The interdicted person is to be denied the right of disposing of his property possessed before and after being interdicted. Thereby, any disposal of his property becomes ineffective since the rights of his creditors are due on his property. Thus, he has no right to grant any part of his property to anyone by any means. Even before being interdicted, it is prohibited for the indebted to dispose of his property in a way that causes harm to his creditors.

Imâm Ibnul-Qayyim (may Allah have mercy on him) says:

"If the debtor's entire property is required to cover his debts, it will be invalid for him to donate thereof, in a way that causes any harm to the creditors, whether those in authority have interdicted him or not. This is the opinion maintained by Imâm Mâlik and Shaykhul-Islâm Ibn Taymiyah (may Allah have mercy on him). Moreover, it is the soundest view which befits the original rulings of the Hanbali School and comes in accordance with the principles of Sharî'ah (Islamic Law) and its rulings. This is because the creditors' rights must be paid from the debtor's entire property. That is why those in authority interdict the debtor. If the creditors' money were not to be paid from the debtor's entire property, those in authority would not have the right to interdict him. Therefore, his case resembles that of the person on the deathbed as he is not allowed to dispose of his property. If the indebted person were given the legal right to donate, this would waste the creditors' rights, and the Sharî'ah never legislates something like this, for among the principles of Sharî'ah is safeguarding people's rights by all ways and blocking means leading to wasting them."[7]

The second ruling is when a creditor finds the very piece of merchandise he has sold to a bankrupt person or has given him as a loan or as a rented article before interdiction, in which case the creditor is allowed to take it back. This is because the Prophet (PBUH) says:

"If a man finds his very things with a bankrupt person, then he has more right to take them back than anyone else."
(Related by Al-Bukhârî and Muslim)[8]

In addition, *faqihs* (may Allah have mercy on them) have stipulated six conditions for taking back an amount of money (a property or a piece of merchandise) given to the bankrupt person before he is interdicted.

The first condition is that the bankrupt person be alive until the owner of the piece of merchandise takes back his property from him, for Abû Dâwûd related that the Prophet (PBUH) said:

"...If he (the bankrupt buyer) dies, then the owner of the property (i.e. the seller) is to be treated equally like the creditors (with regard to distributing the estate)."

The second condition is that the bankrupt person still owes the whole price. Thereby, if the owner of the property is paid a part of its price, it will not be valid for him to take it (the property) back.

The third condition is that the bankrupt person still has the very property (he took from its owner). If the owner of that property finds only part of it, he is not to take it back, since he has not found all his piece of merchandise but only part of it.

The fourth condition is that the piece of merchandise be intact and nothing of its properties has changed.

The fifth condition is that none has any right to claim with regard to that piece of merchandise, for the bankrupt person may have mortgaged it or have used it in any other transaction.

The sixth condition is that the piece of merchandise must not have increased a continual increase, as in the case of animals that fatten and increase in weight[9].

If all the above-mentioned conditions are fulfilled, it becomes permissible for the owner of the piece of merchandise to take it back from the indebted person when the latter is declared legally bankrupt. This is according to the aforesaid *hadith*, in which the Prophet (PBUH) says:

"If a man finds his very things with a bankrupt, then he has more right to take them back than anyone else."

The third ruling on the interdicted person is that the creditors are not to ask him to pay his debts after being interdicted until the interdiction ends. During the period of interdiction, if one sells a piece of merchandise for the interdicted or lends him an amount of money, one is to ask him to pay only after the interdiction has ended.

The fourth ruling is that those in authority are to sell the interdicted person's property and divide its price among the creditors, to pay his due debts, according to the amount of debts he owes to each. This is because it is for this purpose he has been interdicted. Thus, it will be procrastination and injustice to them if the payment of debts is delayed.

Those in authority are permitted to let the bankrupt person keep what he is in need of; his house, provisions and the like. As for the deferred debt, it does not become due when one becomes bankrupt. Besides, the deferred debt is not to be part of the due ones, since the bankrupt person has the right to delay the payment of a deferred debt until it becomes due; yet, he is still obliged to pay it. Moreover, this right to delay the payment of a deferred debt is not to be violated, unlike his other rights to dispose of his remaining property.

After dividing the property of the bankrupt person to settle his due debts, interdiction ends without a legal verdict from those in authority if the property covers all his debts, since there is no more reason for it and debts are settled. In case the sold property of the bankrupt person does not cover all his debts, interdiction does not end except with a legal verdict from those in authority, who have interdicted him and thus they alone can legally end this interdiction.

The Second Type of Interdiction

This type has been established in the *Sharî'ah* (Islamic Law) for the benefit of the interdicted person for safeguarding his property. This is because Islam is the religion of mercy and it does not leave a useful matter but urges people to do it, nor does it leave a harmful matter but warns against it. Among the things that show the leniency of Islam is giving the person who is legally competent the right to dispose of his property and carry on commercial transactions, within the allowable limits, to gain a legal profit, since this will benefit both the individual and the society. However, if a person is unfit to gain profits and to carry on trade due to being a minor, weak-minded or insane, Islam denies him the right of disposing of his own property, and appoints a guardian to protect, keep safe and increase his property. This is to continue until there is no legal impediment; only at that time, he is given back his property in full. Concerning this, Allah, Exalted be He, says:

> ***"And do not give the weak-minded your property, which Allah has made a means of sustenance for you..."*** (Qur'ân: An-Nisâ': 5)

And:

> *"...And test the orphans [in their abilities] until they reach marriageable age. Then if you perceive in them sound judgment, release their property to them..."* (Qur'ān: An-Nisā': 6)

These two noble verses refer to the interdiction decreed for the benefit of the person (who is unable to dispose of his property) since this protects his interests.

This type of interdiction is imposed on one's property and liability. Thus, the interdicted person does not have the right to dispose of his own property through selling, donating or other kinds of transactions. Therefore, it is legally invalid for him to be responsible for paying a debt, guarantee, sponsorship or the like, lest he should cause a loss to other people's properties.

It is invalid for one to be involved with a weak-minded person in financial affairs, such as buying, lending (money or objects) or depositing. In case one does, one is allowed to take back one's property if it is still intact. If such a property is damaged intentionally or unintentionally, it will deserve no compensation since the weak-minded person is not legally required to be liable for such dealings. In such a case, one is considered neglectful as one willingly and voluntarily has concluded transaction with an interdicted person. If the interdicted person (such as a minor or a weak-minded person) causes harm to a person or a property, he is to bear the consequences and be liable to any consequent fines, since the wronged party has not been neglectful nor has he given the interdicted person the permission. Besides, the juristic rule states that in responsibility for damage, both those with legal capacity and those without are equal before the law. With regard to this, the great scholar **Ibnul-Qayyim** said:

> *"The child, the insane and the sleeping person are to compensate for what they spoil of properties. This is one of the commonly agreed upon rulings without which people's interests would not be fulfilled. If those without legal capacity were not to compensate for what they damage, people would damage each other's properties pretending that it is accidentally and unintentionally done."*[1]

Interdicting the Minor Ends in Two Cases:

The first case is reaching puberty, which is known by some signs:

The first sign for the male is discharging semen in wakefulness or during sleep; Allah, Exalted be He, says:

"And when the children among you reach puberty, let them ask permission [at all times]..." (Qur'ân: An-Nûr: 59)

Puberty applies to a male person after the first wet dream.

The second sign is the growth of the pubic hair.

The third sign is becoming fifteen years old. What proves this is what 'Abdullâh Ibn 'Umar (may Allah be pleased with him) said:

"The Messenger of Allah (PBUH) called me to present myself in front of him on the Day of (the Battle of) Uhud while I was fourteen years of age at that time, and he did not allow me (to join the battle). Then he called me in front of him on the Day of (the Battle) of the Al-Khandaq (the Trench) when I was fifteen years old, and he allowed me (to join the battle)."

(Related by Al-Bukhârî and Muslim)[11]

This *hadîth* proves that a child reaches puberty when he is fifteen years old. In another narration, 'Abdullâh Ibn 'Umar explained the reason behind being forbidden from joining the Battle of Uhud saying:

"...He (the Prophet) saw that I had not reached the age of maturity (to be able to fight)."[12]

The fourth sign concerns the young girl, for she is known to have reached puberty when she has her first menstrual period, for the Prophet (PBUH) said:

"Allah does not accept the prayer of a woman who has reached puberty unless she wears a veil."

(Related by At-Tirmidhî who deemed it a *hasan* (good) *hadîth*)[13]

The second case is sound judgment along with reaching puberty, which means displaying competence in handling one's property, for Allah, Exalted be He, says:

"And test the orphans [in their abilities] until they reach marriageable age. Then if you perceive in them sound judgment, release their property to them..."

(Qur'ân: An-Nisâ': 6)

Sound judgment is recognized by testing a person's abilities concerning financial dealings (handling property). To prove a person's sound judgment, he is to be allowed to conclude business deals repeatedly, and if he is not excessively cheated, and he does not spend his money on prohibited or useless matters, he thus shows sound judgment.

Interdicting an insane person of his legal capacity ends in two cases; the first is regaining sanity and the second is being of sound judgment, as previously stipulated with regard to the minor. Interdiction of the weak-minded person ends when he comes to his senses and becomes reasonable in financial transactions. The guardianship of the financial affairs of any of such three kinds of persons (the child, the insane person and the weak-minded person) is carried out during their interdiction by such a person's father if he is just and of sound judgment. This is because a father is the nearest one to show mercy towards his charge. After the father comes the one stated in the father's will as the guardian, for this guardian will be taking the father's place, acting as if he is the father's representative during his lifetime.

The guardian ought to deal with his ward's property in the ward's best financial interest. Allah, Exalted be He, says:

> ***"And do not approach the orphan's property except in a way that is best [i.e. intending improvement]..."***
>
> (Qur'ân: Al-An'âm: 152)

This means that the guardian must not manage or administer the property of the orphan except in a way that benefits the orphan and makes his property legally increase. Though this noble verse refers only to the property of the orphan, it refers, by analogical deduction, to the property of both the weak-minded and the insane. Moreover, the guardian as well, must preserve and look after the property of the orphan or the like and never expose it to risk or devour it unjustly, for Allah, Exalted be He, says:

> ***"Indeed, those who devour the property of orphans unjustly are only consuming into their bellies fire. And they will be burned in a Blaze [i.e. Hellfire]."*** (Qur'ân: An-Nisâ': 10)

Allah, Exalted be He, advised the guardians about orphans to consider the fact that their own children could be under the guardianship of other people at any time in the future; thus, since they like that their children be treated kindly (when they are wards), they must treat other people's children in the same manner. In this regard, Allah, Exalted be He, says:

"And let those [executors and guardians] fear [injustice] as if they [themselves] had left weak offspring behind and feared for them. So let them fear Allah and speak words of appropriate justice." (Qur'ân: An-Nisâ': 9)

Since the wards are unable either to preserve their property or to conclude business deals in a way that would increase property, Allah has appointed guardians over them to take care of their financial transactions on their behalf and to act to their best financial advantage. Allah has given those guardians commands to abide by; He has forbidden the guardians to give the minors their (the minors') property lest they should waste or spoil it.

On the other hand, Allah, Exalted be He, says:

"And do not give the weak-minded your property, which Allah has made a means of sustenance for you..."

(Qur'ân: An-Nisâ': 5)

Al-Hâfiz Ibn Kathîr (may Allah have mercy on him) said:

"Allah, Glorified and Exalted be He, forbids that the weak-minded be given the right of disposing of the people's property, which Allah has made a means of livelihood and sustenance for people, through transactions and other ways of investment. Hence, interdicting the weak-minded of their legal capacity has been introduced."[14]

Just as Allah, Exalted be He, has forbidden allowing the minors to handle their own property and has ordained that upright and sagacious guardians take care of it instead, He warns those guardians against dealing with that property except in a way that legally improves it and makes it grow. Allah, Exalted be He, says:

"And do not approach the orphan's property except in a way that is best [i.e. intending improvement] until he reaches maturity..."

(Qur'ân: Al-An`âm: 152)

In this verse, Allah, Exalted be He, orders Muslims to deal with the orphan's property in his best interest. `Abdullâh Ibn `Abbâs (may Allah be pleased with him) narrated:

"When Allah, Exalted be He, revealed the verse, ***'And do not approach the orphan's property except in a way that is best [i.e. intending improvement]...'*** *"* (Qur'ân: Al-An`âm: 152) *and the verse,* ***'Indeed, those who devour the property of orphans unjustly***

are only consuming into their bellies fire...' (Qur'ân: An-Nisâ': 10), *every one (of the Companions) who had an orphan with him (under his guardianship) hastened to separate his food and drink from the orphan's. Thereupon, the orphan's food used to be kept until it was eaten (by the orphan) or got spoiled. This was difficult for them so they mentioned this to the Messenger of Allah (PBUH). Thus, Allah, Exalted be He, revealed the verse, '**...And they ask you about orphans. Say, 'Improvement for them is best. And if you mix your affairs with theirs – they are your brothers...'***" (Qur'ân: Al-Baqarah: 220) *Thereupon, they (the Companions) mixed their food with the orphans' food and their drink with the orphans' drink."*

In addition, among the deeds through which one could deal kindly and fairly in the orphan's property is employing it in trade to gain profits and make it increase. Thus, the guardian is entitled to trade in the orphan's property or give it to another person sharing the profit and the loss, for `Â'ishah (may Allah be pleased with her) used the money of Muhammad Ibn Abû Bakr (may Allah be pleased with him) in trade on his behalf[15]. Besides, `Umar Ibnul-Khattâb (may Allah be pleased with him) said:

"Trade in the property of orphans; otherwise, it will be consumed by means of (paying from it for) Zakâh."[16]

In addition, the guardian is entitled to spend (reasonably) from the orphan's property to cover the latter's expenses. In this regard, **Shaykhul-Islâm Ibn Taymiyah** (may Allah have mercy on him) said:

"It is desirable to honor the orphan, make him glad and protect him from being humiliated; since protecting and looking after him is for his best benefits."[17]

The guardian of the orphan is also entitled to buy the sacrificial animal on the Feast of Sacrifice (*`Îdul-Adhâ*) from the orphan's property if he is wealthy, since this is a day of happiness and joy. The guardian is entitled as well to spend on the education of the orphan from the latter's property, since this benefits the orphan.

In case the guardian is poor, he is entitled to take from the orphan's property as a fee for managing and administering it, for Allah, Exalted be He, says:

"...and whoever is poor – let him take according to what is acceptable..." (Qur'ân: An-Nisâ': 6)

This verse means that when the guardian needs money, he is permitted to take from the orphan's property according to what is acceptable. In this concern, **Imâm Ibn Kathîr** said:

> *"This verse was revealed concerning the guardian of the orphan, who maintains and manages the latter's property and takes thereof in case he needs. As for the verse, '...**And whoever, [when acting as guardian], is self-sufficient should refrain [from taking a fee]; and whoever is poor – let him take according to what is acceptable...**'* (Qur'ân: An-Nisâ': 6), *'Â'ishah said, 'It was revealed regarding the case of the orphan's guardian; he is permitted to take from the orphan's property a fee equivalent to managing and protecting his (the orphan's) property.' "*[18]

Faqîhs maintain that the guardian over the orphan may take the least of either his due fee (for managing the orphan's property) or the sum that meets his needs. It is narrated that a man came to the Prophet (PBUH) and said:

> *"I have an orphan who has a property but I have nothing. May I spend from his property?" The Prophet (PBUH) replied, "Use the property of your orphan without spending it lavishly."*[19]

Thus, it is impermissible for the guardian to spend from the orphan's property more than the limit Allah has made allowable. Allah warns those using the orphan's property lavishly with the severest threat revealing:

> ***"...And do not consume it excessively and quickly, [anticipating] that they will grow up..."*** (Qur'ân: An-Nisâ': 6)

Allah, Exalted be He, also says:

> ***"...And do not consume their properties into your own. Indeed, that is ever a great sin."*** (Qur'ân: An-Nisâ': 2)

In this verse, Allah means that it is a great sin to consume the orphans' properties into those of their guardians, thus Muslims must be keen on abiding by Allah's order and avoiding that great sin. Furthermore, Allah, Exalted be He, says:

> ***"Indeed, those who devour the property of orphans unjustly are only consuming into their bellies fire. And they will be burned in a Blaze [i.e. Hellfire]."*** (Qur'ân: An-Nisâ': 10)

Imâm Ibn Kathîr interprets this verse saying:

> *"It means when the guardians eat up (i.e. take unlawfully) the orphans' properties without an acceptable reason (i.e. unjustly), it is fire, in fact, which they are eating up in their bellies, and will blaze on the Day of Resurrection."*[20]

It is related in the Two Sahihs[21] on the authority of Abû Hurayrah:

"The Prophet (PBUH) said, 'Avoid the seven great destructive sins.' The people asked, 'O Messenger of Allah! What are they?' He said, 'To associate others in worship along with Allah, to practice sorcery, to kill the soul which Allah has forbidden (to be killed) except by (legal) right, to eat up ribâ,[22] to eat up an orphan's wealth, to flee from the battlefield at the time of fighting, and to accuse chaste women, who are good believers and never even think of anything touching chastity.' "

Besides, Allah, Exalted be He, commands that the orphans' properties be returned to them in full when they are competent; become mentally and physically mature to dispose of them. Allah, Exalted be He, says:

"And give to the orphans their properties..."

(Qur'ân: An-Nisâ': 2)

He also says:

"...until they reach marriageable age. Then if you perceive in them sound judgment, release their property to them..."

(Qur'ân: An-Nisâ': 6)

Moreover, Allah, Exalted be He, says:

"...Then when you release their property to them, bring witnesses upon them. And sufficient is Allah as Accountant."

(Qur'ân: An-Nisâ': 6)

The verse indicates that Sufficient is Allah as Accountant, Witness and Observer over the guardians when conducting the affairs of the orphans and when returning them their properties, whether in full or incomplete.

Endnotes

1 Ad-Dâraqutnî (4505) [4/148] and Al-Hâkim (2403) [2/75].

2 Al-Bukhârî (2287) [4/585] and Muslim (3978) [5/471].

3 See: "*Majmû 'ul-Fatâwâ*" [2/512, 513].

4 Ahmad (19355) [4/389], Abû Dâwûd (3628) [4/31], An-Nasâ'î (4703) [4/363] and Ibn Mâjah (2427) [3/151].

5 Ahmad (2867) [1/313], and Ibn Mâjah (2340) [3/106] and (2341).

6 Ad-Dâraqutnî (4505) [4/148] and (2403) [2/75].
7 See: "*I`lâm Al-Mûwaqqi`in*" [4/8-9].
8 Al-Bukhâri (2402) [5/79] and Muslim (3963) [5/465]
9 Abû Dâwûd (3520) [3/508].
10 See the footnote in "*Ar-Rawd Al-Murbi`* " [5/183].
11 Al-Bukhârî (2664) [5/340] and Muslim (4814) [7/15].
12 Ad-Dâraqutnî (4156) [4/64].
13 Ahmad (25710), Abû Dâwûd (641) [1/298], At-Tirmidhî (377) [1/215] and Ibn Mâjah (655) [1/362].
14 See: "*Tafsir Ibn Kathir*" (1/428).
15 `Abdur-Razzâq (6983) [3/66].
16 Ad-Dâraqutnî (1954) [2/95], Al-Bayhaqî (7340) [4/179] and `Abdur-Razzâq (6990) [4/68]. See also At-Tirmidhi (640) [3/32] and Al-Bayhaqi (7339) [4/179].
17 See the footnote in "*Ar-Rawd Al-Murbi`* " [5/194].
18 See: "*Tafsir Ibn Kathir*" [1/428].
19 Ahmad (6747) [2/186], Abû Dâwûd (2872) [3/197], An-Nasâ'î (3670) [3/567] and Ibn Mâjah (2718) [3/313].
20 See: "*Tafsir Ibn Kathir*" [1/595].
21 The Two Sahihs: The Two Authentic Books of Al-Bukhârî and Muslim.
22 *Ribâ*: A term that includes usury and usurious gain and interest.

CHAPTER

18

Conciliation

Conciliation is an agreement on the basis of which settlement is reached between two disputing parties. In fact, conciliation is of the greatest useful contracts. Therefore, it is advisable to lie a little, if necessary, when making settlement between two parties in a disagreement.

Conciliation is legalized according to the Qur'ân, the *Sunnah* (Prophetic Tradition) and consensus. There are numerous verses which prove Conciliation; Allah, Exalted be He, says,

> ***"...and settlement is best..."*** (Qur'ân: An-Nisâ': 128)

He also says:

> ***"And if two factions among the believers should fight, then make settlement between the two. But if one of them oppresses the other, then fight against the one that oppresses until it returns to the ordinance of Allah. And if it returns, then make settlement between them in justice and act justly. Indeed, Allah loves those who act justly."*** (Qur'ân: Al-Hujurât: 9)

Moreover, Allah, Exalted be He, says:

> ***"No good is there in much of their private conversation, except for those who enjoin charity or that which is right or conciliation between people. And whoever does that seeking means of the approval of Allah – then We are going to give him a great reward."*** (Qur'ân: An-Nisâ': 114)

He also says:

> ***"...So fear Allah and amend that which is between you..."***
> (Qur'ân: Al-Anfâl: 1)

Besides, the Prophet (PBUH) said in a *hadîth* regarded as sahîh (authentic) by At-Tirmidhî:

> *"Conciliation is permissible among Muslims except the conciliation that makes what is lawful prohibited or makes what is prohibited lawful."*[1]

In addition, the Prophet (PBUH) used to make settlement between people who were in disagreement[2].

The permissible conciliation here is the one which is justly arranged, as ordained by Allah and His Messenger (PBUH), and in which one seeks Allah's pleasure and then that of those in dispute.

The one who undertakes conciliation between people ought to be well-informed of the circumstances of the disagreement, aware of what he ought to do in that regard and intending justice when arranging a settlement. In fact, the degree of the Muslim who makes peace among Muslims is better than that of the Muslim who fasts and performs prayer continuously. Yet, if peacemaking is done without justice, it will turn into oppression and doing wrong to the right of the oppressed party; such as making peace between a powerful unjust person and a weak helpless wronged one in a way that pleases the powerful one enabling him to violate and deny the right of the weak one.

Besides, peacemaking is arranged only with regard to the rights of people, when the wronged one could give it up or be compensated for it. However, as for the rights of Allah, Exalted be He, such as the prescribed punishments and the *Zakâh*, there is no way whatsoever to handle it with conciliation, for conciliation with Allah in these cases can be reached by performing these very acts of worship (i.e. prescribed punishments and *Zakâh* etc.)

Conciliation is of Five Types

The First Type: Conciliation between Muslims and non-Muslims who show hostility to Muslims

The Second Type: Conciliation between the Muslim community and rebellious Muslims

The Third Type: Conciliation between the husband and his wife for fear of dissension

The Fourth Type: Conciliation between two parties regarding a matter other than financial affairs

The Fifth Type: Conciliation between two parties disputing over property, which will be demonstrated here. This type is divided into two other types:

1- Conciliation of acknowledgment: Which is of two kinds:

The first kind is to arrange conciliation between the two parties in order to return the very type of the object of disagreement.

The second kind is to arrange conciliation for returning a thing other than the object of disagreement.

The first kind of conciliation of acknowledgment is conciliation to return the very type of the object of disagreement is in cases when one, for example, acknowledges owing another person a debt or acknowledges owing him a sum of money, which is in one's possession. Both parties then agree to conciliate when the indebted party pays part of the debt and the creditor, on his side, relinquishes the rest thereof. Also, this kind of conciliation may happen when the creditor cedes to the debtor an amount of the owed object and takes the rest thereof. This type of conciliation is valid unless the acknowledgment is stipulated. For example, the debtor may say that he acknowledges owing money to the creditor provided that the latter gives him so and so or compensates him with so and so, or the creditor may release the debtor from the debt stipulating that the debtor gives him a certain thing. Arranging conciliation in this manner is invalid, for the creditor has the right to ask for all his rights (all that which the debtor owes him). For rendering this type of conciliation valid, the debtor is not to refuse to give the creditor what he owes him in case there is no conciliation, for this would be an act of consuming people's wealth

unjustly, which is forbidden by Allah. Also, the debtor is to pay what he owes unconditionally (whether there is conciliation or not). In addition, for validating this type of conciliation, the creditor must be of those whose donation is valid; if not, this conciliation would be then invalid. An example for this is the donation given by a guardian of an orphan or an insane person, since the guardian would be donating something that does not belong to him.

In a few words, it is permissible to arrange conciliation between two disputing parties to return the established object of conciliation by part of the same type provided that the debtor does not refuse to give back his debt in case there is no conciliation. Besides, the creditor must be of those whose donation is valid. It is permissible as well to effect conciliation in case the aforesaid requirements are fulfilled, since this would be a donation and one is not to be prevented from relinquishing part of what he lends or from having it back in full. This is because the Prophet (PBUH) asked the creditors of Jâbir Ibn `Abdullâh to make some reduction in his debts[3].

The second kind of conciliation of acknowledgment is conciliation to substitute an object of a different type for the object of disagreement. This happens in cases when someone acknowledges that he owes another person a debt or an object, and both agree that the creditor is to take an object as compensation for a different one. Thus, if conciliation is to be arranged to return money for money, then this will be considered an exchange whose rulings are to be applied in this transaction. If conciliation is to be arranged to give back an object in return for money, this will be considered selling whose rulings are to be applied in this transaction. Moreover, if conciliation is agreed upon for establishing a benefit, as in the case when the creditor hires a place belonging to the debtor, it will be a kind of renting whose rulings are to be applied. If conciliation is arranged to give back money in return for the disputed object, it will be considered selling.

2- Conciliation of Denial

It refers to a person claiming that another person owes him an object or a debt; upon that claim, the other person does not deny the claim but is ignorant of the claimed object. The respondent then asks the claimer to relinquish his claim and to arrange conciliation in which the claimer will obtain a sum of money, whether paid on the spot or deferred. Conciliation in this case is valid according to the majority of the people of knowledge, for the Prophet (PBUH) said:

"Conciliation is permissible among Muslims except the conciliation that makes what is lawful prohibited or makes what is prohibited lawful."

(Related by Abû Dâwûd and At-Tirmidhî, and the latter said, *"This is a hasan (good), sahîh (authentic) hadîth."* Al-Hâkim regards this *hadîth* as *sahîh*)[4]

'Umar Ibnul-Khattâb sent this *hadîth* (in a letter) as a proof of effecting conciliation) to Abû Mûsâ[5]. Thus, this *hadîth* can be safely applied as a proof in this regard because of the aforesaid considerations.

The benefit of this type of conciliation which the respondent gains is avoiding the legal proceedings and taking an oath before the judge. As for the claimer, it spares him the trouble of establishing evidence and helps him obtain what he claims to be his as soon as possible.

In conciliation of denial, the claimer is regarded as selling the claimed object since he believes that what he takes is compensation for his money (the claimed object), thereby he ought to abide by what he believes. It is as if the respondent had bought the claimed object from the claimer, thus the rulings on selling apply to this transaction. Among these rulings is the right to return the sold item for being faulty and the right of preemption, if the right of preemption can be applied therein.

As for the respondent, he is considered, after effecting conciliation with the claimer, acquitted from the claim. He has paid money (for the claimed object) to avoid taking an oath, remove harm that may afflict him, end the dispute, and protect himself against being indulged in disputes. Besides, honorable people reject being involved in such matters and would rather pay money to avoid such claims. If the claimer (who becomes a buyer in this case) finds a defect in the object (given to him in compensation for the disputed one), he does not have the right to return it, and it cannot be taken by preemption from the respondent, as he does not consider it a real compensation for anything.

Conciliation of denial becomes invalid in case either party lies to the other. The claimer may lie claiming his right to an object which he knows well that it does not belong to him. Likewise, the respondent may deny whatever claim is advanced by the claimer though he knows that he is lying and he owes the claimer such a thing. Conciliation thus becomes null for the one who lies concealing the truth, since he knows the truth, and is able to give the right to its owner, and does not believe that he is in the right. Thus, whatever he takes

or obtains in this case by means of the conciliation is prohibited, for he takes it unjustly and wrongfully and not in compensations for something he deserves. Allah, Exalted be He, says in this concern:

> ***"And do not consume one another's wealth unjustly..."***
>
> (Qur'ân: Al-Baqarah: 188)

This conciliation appears to be valid since people do not know the hidden truth, yet, Allah, from Whom nothing is hidden in the earth nor in the heaven, invalidates it. Therefore, Muslims must be keen on avoiding such prohibited actions and should keep away from obtaining money fraudulently.

One of the rulings on conciliation of denial is that conciliation is valid if a third party takes the place of the denying party (the respondent) in the conciliation without his permission. This is because the third party intends to acquit the denying party in order to avoid any dispute with the claimer. It is as if the third party had paid the debts of the denying party on his behalf. Yet, the third party is not to ask the denying party to pay what he has granted, since he does not have the right to do so; the third party in this case is considered a donator.

Another ruling is that conciliation is valid when being arranged to end a disagreement over an unknown object whether both parties owe one another or one of them owes the other. That is, conciliation is applicable if it is difficult to know this object such as the cases of unsettled account from a long time ago and neither of the parties knows what he owes the other. Once, two men disputed over their heritage which was a long time ago. The Prophet (PBUH) said to both of them:

> *"Draw lots, seek the truth, and then let everyone of you absolve his companion (from any right on his side)."*
>
> (Related by Abû Dâwûd and other compilers of *Hadîth*)[6]

In this case, since one of the two parties absolves the other from his right on his liability, conciliation becomes valid. In spite of the fact that the dispute is over an unknown object, it is valid here for necessity, in order to avoid wasting money or being burdened by rights of others. The Prophetic order, in the above-mentioned *hadîth* of absolving one another from any liabilities, signifies that one should be concerned with being absolved from people's rights in order to free one's liability. It also signifies how great and inviolable the rights of people are.

Another ruling on conciliation is that it is valid in cases of *qisâs* (legal retribution) through the payment of *diyah*[7] as a substitute according to the

amount of *diyah* stated in the *Sharî`ah* (Islamic Law), or less or more dependent on the agreement of both parties. Since the object of dispute is not a property that can be compensated for, as it is a human soul, so there cannot be compensation based on human estimation in this case. Rather, the blood money is to be paid according to the *Sharî`ah*.

It is not valid to conciliate something related to the prescribed punishments (punishments enshrined in the Qur'ân and the *Sunnah*), since Allah, Exalted be He, has prescribed these punishments for deterrence. Besides, these punishments are the right of Allah, Exalted be He, and among the rights of the community. Thereby, conciliating something related to these punishments renders them invalid, denies the community of their benefits and opens the way for those intending corruption.

Endnotes

1 Ahmad (8770) [2/366], At-Tirmidhi (1356) [3/634], Ibn Mâjah (2353) [3/112] and Abû Dâwûd (3594) [4/16].
2 Al-Bukhârî (684) [2/217] and Muslim (948) [2/365].
3 Al-Bukhârî (2127) [4/435]
4 Ahmad (8770) [2/366], At-Tirmidhi (1356) [3/634], Ibn Mâjah (2353) [3/112] and Abû Dâwûd (3594) [4/16].
5 Ad-Dâraqutnî (4425) [4/132] and Al-Bayhaqi (20537) [10/252].
6 Ahmad (26596) [6/320] and Abû Dâwûd (3584) [4/13].
7 *Diyah* in Arabic means a compensation payment for a murder or an injury; it mainly means "blood money", and it can also mean "indemnity".

CHAPTER 19

Neighborhood and Roadways

Faqihs[1] have dealt with the issue of neighborhood and roadways and the rulings related thereof because of the great importance this issue has. Problems may arise between neighbors and ought to be immediately solved lest they should cause dispute and hostility.

Muslims ought to solve these problems by arranging conciliation between neighbors who are in disagreement in a way that achieves justice and benefit. If someone makes conciliation, for example, to allow water to pass to him through the land of the neighbor or over his housetop (by means of a water pipe, for example), in return for compensation, this conciliation is valid since it is necessary. If this compensation is to be paid in return for a benefit or for making use of the land or the housetop while they still belong to their owner, this is considered renting. If one wishes to possess the part of his neighbor's housetop or land through which water passes, then this is considered selling. If a neighbor is in need of a passage through a property of the neighbor in return for a compensation or through conciliation, this will be permissible since it is necessary.

The owner of the land or the housetop should not take advantage of his neighbor's need, by asking for a high compensation or refusing to let him make use of that passageway; thus, the owner causes hardship to his neighbor and prevents him from fulfilling his needs. Moreover, if a branch of one's tree (in his land or his house) extends to reach the land or the house of the person next to him, it becomes obligatory on the owner to remove it, either by cutting or bending it toward another direction to pull it away from the land or house of the neighbor. If the owner of the branch refuses to do one of the aforesaid actions, the landowner or the house owner is entitled to remove the harm caused by that branch with one of these actions, since this branch is thus a violation which is to be removed by an action that causes the least damage. If both agree by means of conciliation to leave the branch in its place, this will be permissible, whether in return for a compensation, according to the soundest view of scholars in this regard, or on the basis of sharing the fruit of the branch. The same ruling on a branch applies to the case when a wooden column extends and reaches the land or house of one's neighbor.

It is impermissible to have in one's property that which may cause harm to one's neighbor(s), such as having a bathroom, a kitchen, a bakery or a café whose harms may extend to reach one's neighbor(s) or having a factory whose noise and working of machinery could disturb one's neighbor(s). Even having a window overlooking the house of one's neighbor may cause harm to him.

Moreover, if there is a joint wall between two persons, it is prohibited to open a window through it without the neighbor's permission. Furthermore, it is impermissible to put or fix wooden pegs in the joint wall or in that of the neighbor, except when necessary, and when the wall could bear those wooden pegs and the roof cannot stand without them. This is according to a *marfû'* (traceable) *hadith* narrated by Abû Hurayrah, in which the Prophet (PBUH) says:

> *"No one should prevent his neighbor from fixing a wooden peg in his wall." Abû Hurayrah then said (to his Companions), 'Why do I find you averse to it? By Allah, I certainly will narrate it to you.' "*
>
> (Related by Al-Bukhârî and Muslim)[2]

This *hadith* proves that it is impermissible to prevent one's neighbor from fixing wooden pegs in one's wall. If one refuses, those in authority are to force him to accept, since it is a permanent right of one's neighbor.

What is mentioned above are some of the rulings on neighborhood. As for the rulings with respect to roadways, they are as follows:

- It is impermissible to annoy people on the roadways; one should rather clear a passage for people and remove harmful things from the road, since these deeds are parts of faith as the Prophet (PBUH) stated in his *hadiths*.
- It is impermissible as well for a person to build in his land what may cause trouble to the passage of vehicles, people or animals, such as building a roof (to be shaded by in the road) which prevents the passage of people riding vehicles or animals, or what they carry.
- It is impermissible also to specify a parking place on the road (or the street) for one's riding animal or one's vehicle as long as this may make the road narrow or result in accidents.
- **Shaykhul-Islâm Ibn Taymiyah** (may Allah have mercy on him) said:

  "It is impermissible to have any thing protruding from one's building into the road. It is even forbidden to plaster one's wall (that is next to the street or the road) except when leaving a space (equal to the thickness of plastering) to the inside of one's house and plastering the wall as wide as one has left of space..."

- One is also prohibited to do certain things on the road (or on the street), such as planting, building, digging, putting firewood, slaughtering, throwing garbage and ashes or the like, which may cause harm to the passers-by. Municipality officials are to prevent such actions and inflict a deterring punishment upon whoever acts contrarily, for many people do not take this matter seriously. Some of them occupy the roads to serve their own interests; they use the road for parking their vehicles, putting their construction materials such as bricks, iron or cement, digging the roads, and doing many other violating actions. Others throw harmful things, such as food wastes, rubbish and impure objects in marketplaces without any concern for harming other Muslims. All of these actions are prohibited by Allah and His Messenger (PBUH); Allah, Exalted be He, says:

  "And those who harm believing men and believing women for [something] other than what they have earned [i.e. deserved] have certainly born upon themselves a slander and manifest sin."

  (Qur'ân: Al-Ahzâb: 58)

The Prophet (PBUH) also said:

"A Muslim is he from whose hand and tongue Muslims are safe."[3]

Moreover, he (PBUH) said:

"Faith has over sixty branches, the most excellent of which is declaring that there is no deity but Allah, and the lowest of which is removing harmful things from the way; and modesty is a branch of faith."[4]

There are numerous *hadîths* in which the Prophet (PBUH) urges Muslims to respect each other's rights and to keep away from causing any harm to one another. In fact, one of the things that harm Muslims most is causing them troubles on their way and putting obstacles therein.

Endnotes

1 *Faqîh*: A scholar of Islamic Jurisprudence.
2 Al-Bukhârî (2463) [5/136] and Muslim (4106) [6/48].
3 Al-Bukhârî (10) [1/74] and Muslim (161) [1/22].
4 Al-Bukhârî (9) [1/72] and Muslim (152) [1/195].

CHAPTER 20

Preemption

Preemption is authentically stated in the *Sunnah* (Prophetic Tradition) and Allah, Exalted be He, has ordained it for blocking evil means related to partnership.

The great **Imâm Ibnul-Qayyim** (may Allah have mercy on him) said:

"Preemption is one of the merits of Sharî'ah (Islamic Law) which proves its justice and ability to fulfill people's interests and needs. The wisdom behind legislating preemption is the necessity to prevent any harm caused to people as far as possible. Since partnership, in most cases, results in harm (dispute), such harm can be removed either by dividing the property or by preemption. When a partner wishes to sell his share taking recompense (its due price), the other co-owner is legally more entitled to buy it than any other strange party. Therefore, the buyer prevents the harm caused to him from partnership; and the seller is paid his due right of the price and hence he is not harmed. Preemption also protects the buyer against the harm caused by sharing

the property with a strange party. Thus, preemption is characterized with great justice and is one of the best rulings which are in conformity with sound minds, natural dispositions and interests of people."[1]

Thus, it becomes clear that trying by fraudulent means to invalidate the right to preempt contradicts the purpose for which preemption has been legislated.

At the Pre-Islamic Period of Ignorance (*Al-Jâhiliyyah*), the right of preemption had been common. So, if one wanted to sell one's house or garden, the neighbor or the co-owner would demand the right of preemption to buy the sold share, for such people more entitled to buy it.

According to the *faqîhs*, preemption means that the partner is more entitled to take his counterpart's share sold to another person (a third party) for recompense which is the same price agreed upon by the third party and the other partner. Thus, the buyer has to sell the share he bought to the preemptor against the price upon which both (the buyer and the seller) agreed. This is according to what Imâm Ahmad and Al-Bukhârî related on the authority of Jâbir (may Allah be pleased with him) that:

"The Prophet (PBUH) decided the validity of preemption in every joint undivided property, but if the boundaries are well marked and the ways and streets are fixed, then there is no preemption."[2]

This above-mentioned *hadîth* proves that the co-owner has the right to preempt, and that preemption is only applicable and valid in land and real estates (immovable properties) but not in movable possessions, furniture, animals and the like. The Prophet (PBUH) also said:

"...It is not lawful for him (the partner) to sell that until the other partner gives his consent."[3]

This *hadîth* proves that it is impermissible for the partner to sell his share (to a person other than his counterpart) unless he informs his counterpart about that sale.

In this regard, **Ibnul-Qayyim** said:

"It is impermissible for the partner to sell his share without informing the other partner. If he does, the other partner is more entitled to buy that share. If the partner has asked the permission of the other partner before selling a co-owned property and the latter expresses no intention to buy it, then he does not have the right to preempt it after the sale. This is the conclusive ruling which the Sharî'ah (Islamic Law) has stated and there are no other contradictory views in this regard."[4]

Ibnul-Qayyim maintains that the partner has no right to preempt a sold property as long as he has been asked permission before the sale and showed no intention for buying. In fact, this view is only one of two views of scholars on preemption. However, the majority of scholars are of the view that the partner still has the right to preempt, and his being asked permission does not nullify his right to preempt. Allah, Exalted be He, knows best.

Preemption is a legal right that must be observed, and it is impermissible to try deceitfully to make the other partner lose it, for preemption has been ordained to save the partner from any harm. Thus, if someone uses deceitful ways and plays tricks to deprive his partner from this right, he will harm such a partner and violate his legal right. **Imâm Ahmad** (may Allah have mercy on him) in this concern says:

> *"It is impermissible to use deceitful ways in order to nullify the right of preemption or any other right due to a Muslim. This is because the Prophet (PBUH) said, 'Do not commit what the Jews had committed in order to make lawful what Allah has prohibited, through the lowest tricks.' "*[5] [6]

One of the tricks that the partner may do to nullify the right of preemption is to pretend to have given his share to a third party as a gift, while he has sold it for a price. Also, the partner may ask for a high price from the other partner to make him unable to pay and thus prevents him from preempting. **Shaykhul-Islâm Ibn Taymiyah** said:

> *"Deceitful actions and tricks played by the partner to deny the preemptor his right to preempt, invalidate the contract of sale (with the buyer), besides, whatever words are written do not change the facts of the contracts."*[7]

Preemption, in fact, is valid in joint land if undivided, and whatever trees and buildings there are part of the land. Moreover, if the land has been divided and there are still some joint utilities, such as a joint walkway or a joint source of water or the like, the preemptor still has the right to preempt according to the soundest view of scholars in this regard. It is also according to the general meaning of the *hadith* in which the Prophet (PBUH) says:

> *"...if the boundaries are well marked and the ways and streets are fixed, then there is no preemption."*

This *hadith* signifies that preemption is valid and applicable in divisible things whose boundaries are established and whose roads have not been designated. In this concern, **Ibnul-Qayyim** says:

> *"This is the soundest view as far as the preemption of neighborhood is concerned. It is also the view maintained by the People of Basra and Shaykhul-Islâm Ibn Taymiyah, and is one of the two views reported about the school of Imâm Ahmad."*

Furthermore, **Sheikh Taqiyyud-Dîn** said:

> *"Preemption of neighborhood is valid in case of sharing one of the rights of ownership; such as sharing in a utility of a real estate, a joint waterway or a walkway or the like. This is the view maintained by Imâm Ahmad."*

The same view is also maintained by Ibn `Aqîl, Abû Muhammad and others. In addition, **Al-Hârithî** said:

> *"Preemption of neighborhood is valid when bringing about a benefit and preventing a harm, and there are numerous hadîths supporting this view. This is because neighborhood does not necessitate preemption except when neighbors share the walkway or the like. Besides, preemption has been ordained for preventing harm, which occurs in most cases of co-ownership, or sharing the same utility such as a walkway, a waterway or the like."*

Preemption is valid when someone claims it immediately after having been informed that his partner (or his neighbor) has sold his share (of a real estate) to another party. If the other partner (preemptor) does not demand the right of preemption, he will then lose it. However, if the preemptor does not know about the sale, he still has the right to preempt, even if he remains uninformed about it for years. In this concern, **Ibn Hubayrah** says:

> *"...Muslim scholars uniformly agree that when the preemptor is absent (and thus uninformed about the sale), he is still entitled to demand his right of preemption to buy the sold share as soon as he returns."*

If there are several partners, then they are entitled to preempt according to the shares each possesses of the whole property, since they enjoy their right of preemption by virtue of their ownership. If a partner gives up his right to preempt, the other partner is entitled to buy the rest of the property or relinquish it all, since taking only part of the property will harm the buyer, and harm is not to be removed by causing harm.

Endnotes

1 See: "*I`lâm Al-Mûwaqi`în*" [2/119].
2 Al-Bukhârî (2214) [4/515] and Muslim (4104) [6/46].
3 Muslim (4103) [6/46].
4 See: "*I`lâm Al-Mûwaqqi`în*" [2/121-207].
5 Related by Ibn Baṯṯah.
6 See: "*I`lâm Al-Mûwaqqi`în*" (3/299).
7 See: '*Majmû`ul-Fatâwâ*' (30/286).

II:PARTNERSHIP

CHAPTER

1

Kinds of Partnership

Some light should be thrown on the issue of partnership and its rulings, as partnership is obviously widespread nowadays. People still practice dealing and trading with each other, and this is considered a means of cooperation, with the purpose of attaining common interests through developing and investing wealth and exchanging experiences.

Partnership in trade and the like is deemed permissible according to the Book (the Qur'ân) and the *Sunnah* (Prophetic Tradition). Allah, Exalted be He, says:

"...And indeed, many associates oppress one another..."

(Qur'ân: Sâd: 24)

Here, the word "associates" refers to partners. The noble verse proves the permissibility of partnership and the prohibition of oppressing one another as partners.

The proof of the permissibility of partnership is also stated in the *Sunnah*, as the Prophet (PBUH) said:

> *"Allah, Exalted be He, says, 'I am the third of the two partners (i.e. Allah is with them, taking care of, keeping, supporting, and sending down blessing upon their trade) as long as one of them does not cheat the other. But when he cheats him, I depart from them (i.e. to take blessing away from their trade).'"*[1]

The *hadith* involves the legality of partnership and exhorts people to maintain it provided they do not cheat one another. This is because partnership involves cooperation and assistance, and the Prophet (PBUH) said:

> *"Allah assists the person so long as he assists his (Muslim) brother."*[2]

The person has to choose the one whose wealth is lawfully obtained in order to set up a partnership with him. In addition, he is to keep away from the people whose wealth is completely or partially ill-gotten. It is permissible for a Muslim to go into partnership with a disbeliever, provided that the disbeliever is not to be given full authority to run the business alone. That is, partnership is to be under the supervision of the Muslim partner so as not to let that disbeliever deal in *ribâ*[3] or any kind of prohibited matters, so making use of his Muslim partner's absence of supervision.

Partnership is divided into two sections: **Partnership in properties** and **partnership in contracts.** As for the first, it implies sharing the ownership of a real estate, factory, automobiles, etc. However, the second section of partnership involves sharing in running the business, such as sharing in selling, purchasing, renting, etc. It can be by sharing in both capital and work, or sharing in work without capital.

Partnership in Contracts Consists of Five Types

1- ***'Inân*** **(Cooperative) Partnership:** It involves equal sharing in both capital and work.

2- ***Mudârabah*** **(Speculative) Partnership:** It refers to partnership in which one of the two parties is a silent partner, who only provides capital, while the other runs the business.

3- **Reputable Partner Partnership:** It refers to partnership in trade based on the reputation, not the capital, of the partners.

4- **Manual Partnership:** It refers to partnership in which the two partners share whatever they earn by their own work, not by their wealth.

5- **Comprehensive Partnership:** It includes all the aforesaid types of partnership; cooperative, reputable partner, manual, and speculative partnerships. In this kind of partnership, each partner authorizes the other to freely handle every aspect of the capital and labor.

This is just a summary of the types of partnership, and we shall deal with each in detail below.

Endnotes

1 Abû Dâwûd (3383) [3/438].
2 Muslim (6793) [9/23].
3 *Ribâ*: A term that includes usury and usurious gain and interest.

CHAPTER

2

'Inân (Cooperative) Partnership

It refers to the equivalence between the two partners, in both capital and labor; they equally participate in the business. The real meaning of such a type of partnership is that two or more partners provide equal capital for the business so that the total capital is regarded as one unit. They may work together to invest it or, perhaps, one of them runs the business and so takes more profit than the other(s).

'Inân (cooperative) partnership is deemed permissible in accordance with the consensus of scholars, as recorded by Ibnul-Mundhir (may Allah have mercy on him). Yet, scholars disagree only concerning some of its conditions.

Every partner has the right to dispose of the capital of the partnership due to his share and his being commissioned by the other partner. This is because the word "partnership" indicates each partner's dealing on behalf of the other without taking his permission.

Scholars agree that it is permissible to make the capital of the partnership either gold or silver, as people have been in the habit of doing so since the time of the Prophet (PBUH) up until now without any disapproval. However, they disagree whether it is permissible or not to make the capital of cooperative partnership consist of merchandise (instead of money, gold, or silver). Some scholars maintain that it is impermissible because the value of the merchandise of one partner may increase before selling, while that of the other may not, and thus one partner shares the increase of the other's wealth. Others view that it is permissible to provide merchandise as capital in cooperative partnership, which is a sound opinion. This is because the basis of partnership is that both of the two partners can dispose freely of all their funds, and that they share whatever they earn, and this applies to merchandise as well as money.

Among the conditions of the validity of cooperative partnership is that the profit of each partner should be previously specified (such as having one-third or one-fourth of the profit) according to his shares in the business. This is because the partners share in the profits, and none of them should be favored over the other except with their previous mutual agreement. Therefore, the share in the profit of each partner has to be previously specified; otherwise, their partnership is neither permissible nor valid. Accordingly, it is impermissible for each partner to stipulate that he will get his profit from a certain object (of the capital), or that he will get it at a certain time, or that he will get the profit collected on a certain trade journey. The reason for this is that the specified object alone may or may not achieve profit, or that the trade may make only the profit concerning the share of one person only. This undoubtedly may lead to disputes among the partners, or may make the effort of one of them go in vain, which is prohibited in our lenient *Sharī'ah* (Islamic Law), as it involves deception and harm.

CHAPTER

3

Muḏârabah (Speculative) Partnership

Juristically, *muḏârabah* (speculative) partnership means giving a certain amount of money to others in order to trade with it in return for a share in the profit. Allah, Exalted be He, says:

> ***"...And others traveling throughout the land seeking [something] of the bounty of Allah..."*** (Qur'ân: Al-Muzzammil: 20)

The verse involves seeking bounty through trade and striking of deals.

According to the consensus of scholars, speculative partnership is deemed permissible. Moreover, this type of partnership was practiced during the lifetime of the Prophet (PBUH) and he approved of it. That partnership system is reported to have been practiced by 'Umar Ibnul-Khaṯṯâb, 'Uthmân Ibn 'Affân, 'Alî Ibn Abû Ṯâlib, Ibn Mas'ûd and other compilers of *Ḫadith*, with whom none of the Companions (may Allah be pleased with them all) has disagreed.

Wisdom requires the permissibility of speculation with wealth, as people need it; wealth can only be developed or invested through trade and transaction.

With regard to this issue, the great scholar **Ibnul-Qayyim** said:

> *"A speculator is a trustee, a hired person, a representative, and partner. He is a trustee when he takes the other partner's wealth and becomes entrusted with it; he is a hired person as he works himself on wealth; he is a representative as he freely disposes of it; and he is a partner as he shares in the profit if any*[1]*. In order to maintain the validity of the speculative partnership, the entrusted speculator's share of the profit should be previously specified, as it would be his due according to such a mutual agreement."*

Ibnul-Mundhir said:

> *"Scholars unanimously agreed that the worker (the entrusted speculator) has the right to stipulate a certain percentage of the profit from the beginning, such as one-third or half of the profit, or whatever is agreed upon by the two partners. Still, if the owner of the money specifies a certain amount of the profit or the whole profit for the worker (the entrusted speculator), or specifies nothing at all, their partnership becomes invalid."*[2]

The share of the profit that the entrusted speculator will get depends on the mutual agreement between him and the investor (the owner). Therefore, if the owner asks the worker to trade with his money telling him that they will share the profit together, then the profit is to be equally divided between them. Moreover, it is permissible for the owner to stipulate that he will get a certain share of the profit, such as three-fourths or one-third of the profit. This is because when the share of each is known, both of them will get his due share of the profit. In other words, when the share of one of them is specified, the other's share will be known accordingly.

If the two partners dispute regarding whose share of the profit is the specified one, it must be given to the entrusted speculator, be it much or little. This is because he is the one who deserves it due to his work and effort. The worker's share of the profit already varies depending on how much effort he exerts; he may get a small share of the profit for an easy or simple work, or get a large share in case of hard work. In addition, the estimation of the share of profit specified for the entrusted speculator depends on his skill. Consequently, his share of the profit is to be stipulated, unlike the owner who deserves his share due to the wealth he owns and provides, not through conditions.

If the speculative partnership is cancelled, the profit is to be for the owner, as the capital as well as its increase belongs to him. However, the entrusted speculator is just to get his wage, as the profit is to be according to the stated condition, and the condition is abrogated as a result of the abrogation of the speculation.

It is permissible to set a certain period for the speculative partnership, after which the partnership is to be terminated. That is, the owner of the wealth may stipulate that he will agree on a speculative partnership with the worker for a year for example. A speculative partnership is also permissible to be based on a future condition. To illustrate, it is permissible for the owner to specify a certain month for the entrusted speculator to start using the money of the former for speculation. He may also ask the entrusted speculator to use his money for speculation after the latter gets it from such and such a person. This is because speculative partnership is permission of free disposal of the money given by the owner of the money to the entrusted speculator, so it can be dependent on a future condition.

On the other hand, it is impermissible for an entrusted speculator in a speculative partnership to work as a partner for another capital owner if that will negatively affect his first partner, unless the latter gives him permission. For example, the wealth of the worker's new partner may be so much that it takes all his time and thus negatively affects the interests of his first partner. Moreover, the wealth of the first partner may be so much that it takes all the time of the entrusted speculator, and thus if the latter gets into another speculative partnership, he may be inattentive of some of the first partner's interests. Yet, it is permissible for the worker to speculate in the wealth of another partner when the first partner gives him permission to do so and when there will be no harm caused to the first partner's interests.

In this connection, if the worker speculates in the wealth of a second partner without the permission of the first, causing harm to the first partner's interests, the worker is to take his share of the profit made through his second speculative partnership and add it to the profit of the first partnership. After that, the total profit is to be divided between him and his first partner according to their previously stated conditions. This is because the effort exerted by the worker in his second speculative partnership should have been exerted in the first.

It is impermissible for the worker (entrusted speculator) to spend from the capital of the speculation, neither for travel expenses nor for anything else, unless it is previously stipulated. This is because the worker is supposed to speculate in his partner's wealth in return for part of the profit, so he is

not allowed to spend from the main capital in petty expenses and thus take more than his share. This is only permissible if it is previously approved by the owner of the money or there is a conventional trade practice that enables one to do so.

The profit should not be distributed as long as the contract of the speculative partnership is in effect, unless both parties agree to divide it. This is because the profit is regarded as a means of protecting the capital; the profit is used to cover any accidental loss during speculation. So, if it is divided while the partnership contract is in effect, it will not be possible to make up for any accidental loss. In brief, the profit is a way of saving the capital, so the worker does not have the right to claim any profit except after the capital spent is completely regained.

Since the worker is a trustee, he has to fear Allah regarding what he is entrusted with, and should be believed regarding any claim about loss or damage of the property. He should also be believed concerning whatever he claims he has purchased for himself not for the speculation, or vice versa, as he is entrusted with that from the beginning. And Allah knows best.

Endnotes

1 "See ûhe footnotes in *Ar-Rawd Al-Murbi ' "* [5/253].
2 See: "*Kitâb Al-Ijmâ '* " (p. 58).

CHAPTER

4

Reputable Partner, Manual, and Comprehensive Partnerships

First: Reputable Partner Partnership

It is a trade partnership in which two or more partners provide no capital but they are reputable enough to purchase trade goods for deferred payment. The partners share whatever loss or profit in accordance with what they have previously stipulated. This kind of partnership involves no capital. Rather, the partners purchase and sell goods depending on their good reputation, covenant, and people's trust in them, and share in the profit according to their previous stated conditions; the Prophet (PBUH) said:

"Muslims must keep to the conditions they have made."[1]

This type of partnership is similar to *'inân* (cooperative) partnership, so it is given the same rulings. Each of the two partners is considered a representative commissioned by the other partner, as this type of partnership is based on commission and sponsorship.

The share of each partner, with regard to the ownership, is to be specified according to their mutual agreement, be it an equal, less, or more share. In addition, each of them is to bear his share of the loss in accordance with what he owns in the partnership; if one owns half the company, one is to bear half the loss, and so on. Likewise, the share of the profit of each partner depends on their previous stipulation, be it half, fourth, or third of the profit. This is because one of them may be more reputable and trustworthy among merchants than the other, or more skillful in trade than the other. Moreover, the effort or the kind of work done by one partner may differ from that done by the other, so one of them may deserve to have a larger share than that of the other. In such a case, they are to stick and refer to the conditions they agreed upon.

It is worth mentioning that each partner in this type of partnership has the same rights stated in *`inân* (cooperative) partnership.

Second: Manual Partnership

It is a kind of partnership in which two or more partners share whatever they earn by their own work. It is so called because the partners use their manual power in working, as a means of earning money, and they share whatever profit they get.

The legal proof of the permissibility of manual partnership is the *hadîth* in which Ibn Mas`ûd (may Allah be pleased with him) said:

> *"I, `Ammâr, and Sa`d became partners in what we would get (from the booty) on the Day of (the Battle of) Badr. Sa`d then brought two prisoners, but I and `Ammâr did not bring anything."*
>
> (Related by Abû Dâwûd, An-Nasâ'i, and other compilers of *Hadîth*)[2]

Imâm Ahmad commented:

> *"The Prophet (PBUH) made them share in the ownership of the two prisoners. Hence, this hadîth proves the permissibility of manual partnership."*

As soon as partners get into manual partnership, the works accepted by one of them become obligatory to be accepted by the other(s). So, each of the partners is demanded to fulfill what has been accepted by the other, as entailed by the manual partnership between them.

Manual partnership is still valid even if the partners do different kinds of work. For example, it is permissible to make a manual partnership between a tailor and a metalworker, and so on. Every partner has the right to demand his equal share in the profit made by the other. Also, in case they lease a place, it is permissible for the tenant to pay any of them the rent; and in case they rent a place, the landlord has the right to ask any of them for the rent. This is because each of the two partners is considered a representative of the other, so they share whatever responsibilities or duties due to their manual partnership.

Manual partnership is also valid in cases of lawful manual work such as cutting firewood, collecting fruit from mountains, mining, etc.

If one of the partners becomes ill, the profit gained by the other should still be divided between both partners. This is supported by the aforementioned narration which states that Sa`d, `Ammâr and Ibn Mas`ûd made a manual partnership, and Sa`d then brought two prisoners, while the others failed to get any; however, the Prophet (PBUH) made them share in the ownership of the two prisoners. With regard to this issue, if the healthy partner demanded the sick one to appoint a new worker as a substitute, the sick partner is obliged to agree. This is because their partnership is based on manual work on the part of both of them. So, if one of them is unable to work, he has to appoint another in his place to maintain the validity of their partnership contract. Therefore, if the ill partner refuses to appoint someone in his place, the other partner can cancel the partnership contract.

In manual partnership, it is permissible that partners share in the ownership of riding animals or taxis and share whatever fares they get from them, for it is a means of earning after all. It is also permissible that a person gives an animal or a taxi to another to work on and share whatever fares they get. Similarly, it is permissible that such manual partnership is concluded between three partners; one provides the animal for example, the other provides the necessary tools, and the third works on it, and that whatever they earn is to be distributed among them. Likewise, such partnership among agents (who promote the selling process, display the goods, and bring customers) is deemed permissible, and whatever they earn is to be distributed among them.

Third: Comprehensive Partnership

It is a type of partnership in which each partner authorizes the other to handle freely every aspect of the capital and labor. It includes all the aforesaid types of partnership; cooperative, reputable partner, manual, and speculative

partnerships. It also involves that the partners may share what they possess as well as what they owe.

This comprehensive type of partnership is permissible, as it comprises permissible types of partnership; it is deemed permissible because all its components are deemed so.

With regard to this type, the profit is to be distributed in accordance with the partners' mutual agreement. As for the loss, it should be borne according to each partner's financial contribution.

In this way, our sacred *Sharî`ah* (Islamic Law) extends the means of earning within the permissible limits. It allows man to get his earning, whether individually or through sharing with others, and makes people obliged to fulfill their conditions, provided they are lawful and just. All this confirms the validity and applicability of this *Sharî`ah* everywhere and at any time.

Finally, we invoke Allah to grant us the abidance by this sacred *Sharî`ah* and to help us follow its path, as He is the Hearing and the Responsive.

Endnotes

1 Abû Dâwûd (3594) [4/16]. See also At-Tirmidhî (1352) [3/634].
2 Abû Dâwûd (3388) [3/440], An-Nasâ'î (3947) [4/67] and Ibn Mâjah (2288) [3/79].

III:SHARECROPPING AND RENTING

CHAPTER

1

Sharecropping (*Muzâra`ah* and *Musâqâh*)

Muzâra`ah and *musâqâh* are two systems among the systems of conducting agricultural transactions which people practiced from the ancient times due to the dire human need of them. A person may possess a certain number of trees that he cannot attend to or use. Another may have the capacity to work but he owns neither trees nor land. Thus, the two systems of *muzâra`ah* and *musâqâh* were permitted for the benefit of the two parties, just as all the Islamic legal transactions which are based upon justice, the achievement of benefits, and the prevention of causes of corruption.

Musâqâh

Faqihs define *musâqâh* as giving planted or unplanted trees along with a piece of land to someone to plant them therein, water them, and perform the necessary work until they bear fruit. The farmer then is to be given a specified share of the fruits of these trees, from an unspecified part of the land, while the rest goes to their owner.

Muzâra`ah

Muzâra`ah is defined as giving a land to someone to cultivate or giving a land along with some seeds to someone to plant them therein and take care of the plantation in return for a specified portion of the harvest, from an unspecified part of the land, while the rest is for the landowner.

A preconditioned part of the harvest in *musâqâh* and *muzâra`ah* goes to the landowner while the rest is for the sharecropper.

The legal evidence of the permissibility of *musâqâh* and *muzâra`ah* is clear in the *hadîth* narrated by Ibn `Umar (may Allah be pleased with him) in which he said:

> *"The Prophet (PBUH) concluded a contract with the people of Khaybar for them to utilize the land on the condition that half the harvest of fruits or plants would be their share."*[1]

Moreover, **Imâm Muslim** related:

> *"The Prophet (PBUH) returned to the Jews of Khaybar the date palms of Khaybar and their land on the condition that they should work upon them with their own wealth (seeds, implements, etc.) in return for half of the harvest."*[2]

Imâm Ahmad also related:

> *"The Prophet (PBUH) gave the people of Khaybar the date palms and the land of Khaybar on the condition that they will give half of the yield (to Muslims)."*[3]

These *hadîths* prove the validity of *musâqâh* in Islam.

Imâm Ibnul-Qayyim said:

> *"In the story of Khaybar, there is a legal evidence of the permissibility of musâqâh and muzâra`ah in return for a specified portion of the yield, be it fruits or crops. The Messenger of Allah (PBUH) continued dealing with the people of Khaybar (through musâqâh and muzâra`ah) until his death, and he never invalidated it. The Rightly-guided Caliphs continued dealing with these two systems as well, not as a form of rent but as a kind of partnership which is exactly like speculation."*[4]

Al-Muwaffaq Ibn Qudâmah said:

> *"The Rightly-guided Caliphs applied these systems during their caliphates. These systems were widespread and none prohibited them. Thus, there was a consensus among the Muslim scholars on their validity."*

He added:

> *"It is impermissible to rely on that which disagrees with the Sunnah (Prophetic Tradition) and juristic consensus in this regard. Many are those who own date palms and trees which they are unable to attend to, water, or lease. On the other hand, there are people who do not own any trees but they need the fruits. Thus, the permissibility of the two systems satisfies both needs and accomplishes the benefits of the two parties."*[5]

Firstly: Rulings on *Musâqâh*

Faqihs (may Allah have mercy on them all) mentioned that for the *musâqâh* to be valid, the trees in question should be that of edible produce. They also stated that it is impermissible to apply this system on fruitless trees or ones that bear inedible fruits, as there are no rulings pertaining to such cases.

Among the conditions for the validity of *musâqâh* is the estimation of the sharecropper's or the owner's share with a specified portion of the produce, like, for example, a third or a quarter, whether the stipulated share is little or big. Accordingly, it is invalid if they stipulate that all the yield would be for one of them, because in this case one of them would have all the harvest while the other would have nothing. It is also invalid to stipulate a certain number of *ṣâ* 's of the harvest, like ten or twenty *ṣâ* 's, for the trees may yield nothing but this amount and, in this case, the one with the specified share would have all the yield. Similarly, if a certain sum of money is stipulated for one of the parties it will be invalid, for the harvest may not be of the same value previously estimated. Moreover, it is invalid to make the share of one of them limited to the fruit of one or some specified trees, as it may happen that only those specified trees are the ones which will bear fruit, so one of the parties will have all the harvest. On the other hand, the specified tree(s) may not bear fruit at all, and thus the one with the preconditioned share would be deprived of any share of the harvest. Thus, there will be risk and loss in such cases.

The valid opinion maintained by the majority of scholars is that *musâqâh* is a binding contract that cannot be cancelled by one of the two parties unless the other gives his consent. It should be for a specified period of time even if it is long, so long as the trees are there. It binds the sharecropper to do whatever is needed for having a good harvest; like plowing, watering, removing the harmful plants, grafting date palms, drying the fruits, fixing watercourses, and distributing water among the trees.

The owner of the trees has to do whatever is necessary to preserve the asset, namely the trees, by digging a well (or providing any source of water), building walls, and the like. The owner has also to provide the materials necessary for having strong healthy trees like fertilizers and the like.

Secondly: Rulings on *Muzâra`ah*

Giving the seeds to the sharecropper along with the land by the landowner is not a condition for the validity of *muzâra`ah*. Thus, if he hands over the land to the sharecropper to cultivate using seeds belonging to the latter, it is considered permissible as maintained by some of the Prophet's Companions and acted upon by people afterwards. This opinion is based on the evidence of the validity of *muzâra`ah*, namely the *hadîth* illustrating the Prophet's dealing with the Jews of Khaybar in this agricultural system; the Prophet (PBUH) granted them the land to utilize on the condition that half the harvest would be their share. Yet, it was not mentioned in the *hadîth* that providing seeds was incumbent on the Muslims.

Imâm Ibnul-Qayyim (may Allah have mercy on him) said:

> *"Those scholars who stipulate that the landlord must provide seeds along with the land (in muzâra`ah) base their opinion on an analogy with the judgment pertaining to speculative partnership. However, this analogy does not only contradict the authentic Sunnah (Prophetic Tradition) and the opinions of the Prophet's Companions, but it is also regarded as one of the worst and most corruptive analogical deductions. This is because the capital in speculative partnership goes back to its owner, then the two partners divide the profit among them. The land in muzâra`ah is similar to the capital in speculative partnership, for both go back to their owners. However, the seeds, if provided by the landlord, do not return to him, as they are consumed just like all other land consumables. Therefore, regarding the seeds as a consumable asset is worthier than regarding them as a remaining one."*[6]

The legal proof of the permissibility of *muzâra`ah* is stated in the honorable *Sunnah* as mentioned above. The need for *muzâra`ah* also calls for its permissibility, as there are many people who own agricultural lands but cannot attend to them, and there are many others who can work in agriculture but do not own lands. Thus, the Islamic legal wisdom ascertains the permissibility of *muzâra`ah* for the benefit of the two parties, the landlord and the sharecropper. In this way, cooperation for accomplishing benefits and avoiding damages will be achieved.

Shaykhul-Islâm, Ibn Taymiyah (may Allah have mercy on him) said:

> *"Muzâra`ah is of more basic origin than tenancy and closer to maintaining justice, as the two parties share the profit as well as the loss."*[7]

Imâm Ibnul-Qayyim (may Allah have mercy on him) said:

> *"It (i.e. muzâra`ah) is farther from injustice and harm than tenancy, for in tenancy one of the parties will surely gain profit while in muzâra`ah, if there is a crop, both will share the profit, and if there is not, they will share the loss."*[8]

Having a specified share for the sharecropper or the landowner from the crop is a condition for the validity of *muzâra`ah*, and the specified share should be a known part of the harvest, such as a third or fourth of the harvest. This is because the Prophet (PBUH) granted the people of Khaybar the lands on the condition that half of the yield should be for the Muslims.

If the share of one of the parties is specified, the rest will be for the other; since the yield is theirs, if one share is specified, the other share will be known accordingly. It is invalid to specify a certain weight of the crop, such as a certain number of *sâ*'s, or to specify the yield of a certain part of the land, for one of the two parties. It is also invalid for the landowner to stipulate that he will take an amount of the crop equal to that of the seeds he has provided and then they both share the rest. This is because the land may not yield but this amount, and in such a case, the landowner will have all the crop and the sharecropper will have nothing. It was narrated that when **Râfi` Ibn Khadîj** (may Allah be pleased with him) was asked about renting land in return for gold and silver (i.e. dinars and dirhams; money), he said:

> *"There is no harm in it. However, people (landowners) used to rent their lands during the lifetime of the Messenger of Allah (PBUH) in return for the yield situated near canals, banks and at the ends of the streamlets, or in return for the vegetation of a specific area of the*

land. Sometimes the vegetation of the specified area was damaged (by blights) while the rest remained safe, and vice versa. People did not rent their lands except through that way. Yet, the Prophet (PBUH) prohibited it, because it involves harm to people's interests that may lead to disputes and devouring people's wealth unjustly. However, there is no harm in renting the land for something specified and guaranteed (such as silver and gold; money)."[9]

This narration proves the unlawfulness of *muzâra'ah* in return for what may bring about harm and dispute among people.

Ibnul-Mundhir said:

"Records reported from Râfi' came with reasons which demonstrate that the Prophetic prohibition was for these same reasons they did habitually. Râfi' said, 'We used to rent the land for the yield of a specific portion. But sometimes that portion did not give yield while the rest of the land did, and vice versa.' "[10]

Endnotes

1 Al-Bukhârî (2328) [5/14] and Muslim (3939) [5/453].
2 Muslim (3943) [5/456].
3 Ibn Mâjah (2468) [3/174].
4 See the footnote in *Ar-Rawd Al-Murbi'* " [5/276].
5 See: "*Al-Mughnî*" (7/530).
6 See: "the footnote in "*Ar-Rawd Al-Murbi'* " [5/289].
7 See: '*Majmû'ul-Fatâwâ'* (28/85).
8 See: "the footnote in "*Ar-Rawd Al-Murbi'* " (5/287].
9 Muslim (3929) [5/449]. See also Al-Bukhârî (2327) [5/13].
10 Al-Bukhârî (2722) [5/396].

CHAPTER

2

Renting Things and Hiring People's Services (*Ijârah*)

The contracts of renting and hiring continually recur in the lives of people concerning their different interests and their daily, monthly and yearly dealings. Thus, it is important to know the rulings pertaining to such dealings, for all people's dealings, wherever and whenever they are, are codified in *Sharî`ah* (Islamic Law) in accordance with legal norms which guard interests and put an end to harm.

Ijârah means renting something or hiring someone's services in return for a certain payment. Allah, Exalted be He, says:

> ***"...[Moses] said, 'If you wished, you could have taken for it a payment.'"*** (Qur'ân: Al-Kahf: 77)

According to Muslim jurists, *ijârah* is defined as follows: a lease for a lawful identified use of either an identified present or described anticipated thing, for

a specified purpose and for a known period of time, or (a hiring agreement) for the performance of a certain service in return for a specified compensation.

The aforesaid general definition comprises most of the validity conditions for *ijârah* as well as its types:

- The phrase "a lease for a ... use" implies that the hiring of slaves is not included in *ijârah*, for it is rather selling than hiring or renting in this case.
- The word "lawful" excludes all kinds of renting or hiring for unlawful use, like adultery for example.
- The phrase "identified use" excludes any unknown benefit or use through *ijârah*, in which case the lease becomes invalid.
- The phrase "a lawful identified use of either an identified (present) or described anticipated thing... or (a hiring agreement) for the performance of a certain service" indicates that *ijârah* is of two types:

  Firstly, *ijârah* can be for the use of an identified (present) or described anticipated thing. An example of renting an identified thing is when a landlord says, "I rent you this house", while an example of renting a described thing is when an owner of a pack animal who rents it says, "I rent you a pack animal of such and such a description for transporting or riding."

  Secondly, *ijârah* can also be hiring someone for performing a specific service, like, for example, someone who hires another to drive him to such and such a place, or to build him a wall or the like.

- The phrase "for a known period of time" means that the rent period should be specified; a day or a month, etc.
- The phrase "for a specified compensation" indicates the necessity of specifying the payment for renting something or hiring someone.

Thus, all the validity conditions of the two types of *ijârah* can be summarized in the following:

- The lease has to be related to the use of the object, not the object itself.
- This use of the object should be lawful.
- The purpose of renting should be known.
- If the rent object is not identified (present), it should agree with the description of its owner.

- The rent period should be specified.
- The rental payment should be specified.

The valid *ijârah* is permissible according to the Qur'ân, the *Sunnah* (Prophetic Tradition), and juristic consensus:

- Allah, Exalted be He, says:

"...And if they breastfeed for you, then give them their payment..."
(Qur'ân: At-Talâq: 6)

Allah also says:

"... [Moses] said, 'If you wished, you could have taken for it a payment.'" (Qur'ân: Al-Kahf: 77)

- The Prophet (PBUH) also hired a man to show him the way during his Emigration from Mecca to Medina.
- **Ibnul-Mundhir** stated that jurists unanimously agree on the permissibility of *ijârah* (renting something or hiring someone's service)[1].

Moreover, *ijârah* is a human necessity, as there is need for the benefits of rent as much as there is need for the objects of rent.

It is permissible to hire a person for a certain job, such as for tailoring a garment, building a wall, or for guiding one through one's way. It is stated in *Sahîh Al-Bukhârî (Al-Bukhârî's Authentic Book of Hadîth)* that 'Â'ishah (the Prophet's wife, may Allah be pleased with her) narrated in the *hadîth* of the Prophet's *Hijrah* (Emigration to Medina):

"The Prophet (PBUH) and Abû Bakr (may Allah be pleased with him) employed 'Abdullâh Ibn Urayqit Al-Laythî as a guide; he was an expert guide."[1]

It is impermissible to rent houses, shops and stores for committing sins, such as selling intoxicants or forbidden things like tobacco or making pictures, as renting here is considered an assistance in committing sins.

It is permissible for a tenant to rent what he has rented to someone else to make use of, for the tenant is considered a temporary owner of what he rents. Thus, it is permissible for him to use it or let someone else use it instead. Still, the second tenant must use the rented object in the same way of the first, or in a better way. For example, a tenant of a house can rent it to another tenant provided the latter uses it for living therein or for a less damaging use. However, it is impermissible for him to rent the place for someone who will use it as a factory or a laboratory.

It is impermissible to hire someone to perform acts of worship or piety that bring one near to Allah, such as performing *Hajj* (pilgrimage) on one's behalf, or announcing the prayer call (*adhân*). This is because such deeds are individually performed to draw one closer to Allah, and receiving wages for them makes them far away from being acts of worship. However, it is permissible to receive financial support from the Muslims' Public Treasury for acts of transcending benefits, such as performing *Hajj*, announcing prayer call (*adhân*), leading people in prayer, teaching the Qur'ân and *fiqh* (Islamic Jurisprudence), judging, and delivering *fatwa*[3]. Receiving payment in such cases is not a kind of compensation, but rather a help to perform acts of obedience. This does not void such pious and righteous acts, nor does it affect the sincerity of their performance.

Shaykhul-Islâm Ibn Taymiyah (may Allah have mercy on him) said:

> *"Faqihs unanimously agree on the difference between hiring to perform various acts of worship and granting financial support for their performers. Giving provision to fighters, judges, prayer callers (mu'adhdhins) and imâms*[4] *is indisputably permissible. As for hiring someone to perform such acts of worship on one's behalf, it is impermissible according to most of them (i.e. Muslim scholars)."*[5]

Ibn Taymiyah also said:

> *"In such cases, whatever is taken from the Muslims' Public Treasury is not a kind of compensation or wages, but it is provision for helping in performing such acts of obedience. Whoever uses such a financial support for working such acts for the sake of Allah will be rewarded, and what he is granted by the Muslims' Public Treasury will be regarded as an aid in performing such acts of worship."*[6]

The Duties of a Lessor and a Lessee

- A lessor has to do whatever can help the lessee to benefit from the object of rent, such as fixing the rented car and preparing it for working and freight, and reconstructing the rented house and fixing whatever is damaged therein and preparing its utilities for use.
- When the period of rent is over, a lessee has to fix whatever damages he has caused.

- *Ijârah* (renting) is a binding contract for the two parties, the lessor and the lessee, for it is regarded as a kind of sale, so the judgments of sale applies to it. A lessor or a lessee cannot cancel the lease except with the consent of the other. But if a certain defect appears about which the lessee has not been informed before signing the contract, he has the right to cancel it.
- The lessor is obliged to hand over the object of rent to the lessee, and to enable him to utilize it. If the lessor rents something and then prevents the lessee from using it during all or some of the period of rent, he has no right to receive all or some of the rental, for he has not handed the lessee what the lease has stated. If the lessor enables the lessee to utilize the object of rent but did not take the rent during all or some of the period of lease, full rent is due upon the lessee. This is because the lease is a binding one, thus what is stated therein should be carried out; rental is the right of the lessor while utilization is the right of the lessee.

Two Cases in Which the Lease Can be Cancelled

First: when the object of rent is damaged, as in the case when one rents a riding animal and then it dies, or a house and then it collapses, or a land for cultivation and then it becomes deprived of water.

Second: When the purpose of renting or hiring is no longer there, as in the case when a person hires or sends for a physician to treat him and then he becomes well before the physician treats him. In such a case, the hiring agreement is canceled because its purpose is no longer there.

When someone is hired for a certain work and he becomes ill, someone else has to be hired at his expense to replace him, unless it is stipulated that the work should be done by the original hired person. This is because the purpose of hiring may not be achieved through another person. In this case, the hirer does not have to accept the work of a person other than the one he has hired, but he is given the option either to wait until the hired person gets well or to cancel the contract because he cannot get his right.

A Hired Person Is of Two Kinds

1-**Private hired person:** One who is hired for a specific period of time, during which all his work is a due right only to one person, the one who hires him, with no partners (such as a servant or a driver).

2-Public hired person: One whose usefulness is estimated according to his work, which is not dedicated to one person, but he can work for more than one person at a time (such as a tailor).

A private hired person is not financially liable for what he damages by mistake during his work, such as the case when the machine or the tool he is using is damaged. This is because he is regarded as the owner's deputy, thus he is not asked for recompense. However, he is to compensate for whatever he damages out of negligence, transgression, or misuse.

As for a public hired person, he is financially liable for whatever he damages because he does not deserve his payment except through the accomplishment of his work. Hence, he is financially liable for his work, and whatever he damages falls under his liability.

The payment of the hired person becomes due through the hiring contract. He cannot ask for his wages except after delivering the work, which is regarded as his obligation, accomplishing the service, or handing over the object of rent (in case of renting, not hiring) after the period of rent is over, provided there is no hindrance. This is because the hired person is paid his due compensation after finishing his work or delivering what is in his responsibility. In fact, the payment for renting or hiring is a kind of compensation, so it is not due except after the delivery of the compensatory object, be it a service or an object.

A hired person has to perfect and complete his work; he is forbidden to cheat or deceive. He also has to continue the work during the period he is hired in, and he is not to waste any time during that period without working. A hired person has to fear Allah while performing his due work.

On the other hand, the duty of a hirer is to pay the person whom he hired his complete wages upon finishing the work he is hired to do. The Messenger of Allah (PBUH) said:

> *"Give the laborer his wages before his sweat is dry (i.e. immediately after he finishes his work)."*[7]

Abû Hurayrah (may Allah be pleased with him) also narrated that the Prophet (PBUH) said:

> *"Allah, Exalted be He, says, 'I will be against three (persons) on the Day of Judgment – and I defeat whomever I am against on the Day of Judgment: one who makes a covenant in My Name but he proves treacherous; one who sells a free person (as a slave) and eats the price; and one who employs a laborer and gets the full work done by him but does not pay him his wages.' "*
> (Related by Al-Bukhârî and other compilers of *Hadîth*)[8]

The work of a hired person, a laborer, is a trust in his responsibility; he has to perform and accomplish his duty perfectly and sincerely. On the other hand, the wages of a hired person is a debt and a duty on the part of the hirer, which is incumbent upon him to fulfill without procrastination or injustice. And Allah, Exalted be He, knows best.

Endnotes

1 See: "*Al-Ijmâ`* " (p. 60).
2 Al-Bukhâri (2263) [4/558].
3 *Fatwa*: A legal opinion issued by a *mufti* [A Muslim scholar specialized in issuing legal rulings] in response to a layman's question on a point of the Islamic Law.
4 The *imâm* is the one who leads the congregational prayer.
5 See: '*Majmû`ul-Fatâwâ*' (30/206).
6 See: "*Al-Akhbâr Al-`Ilmiyyah min Al-Ikhtiyârât Al-Fiqhiyyah*" (p. 223).
7 Ibn Mâjah (2443) [3/162].
8 Al-Bukhâri (2227) [4/527] and Ibn Mâjah (2442) [3/162].

CHAPTER

3

Competition (*Sabq*)

Competition in *Sharî'ah* refers to a race between two animals or contests such as archery and shooting.

Such races and contests are permissible according to the Qur'ân, *Sunnah*, and juristic consensus, as they may be used to improve abilities.

Allah, Exalted be He, says:

> ***"And prepare against them whatever you are able of power..."***
>
> (Qur'ân: Al-Anfâl: 60)

Moreover, the Prophet (PBUH) said, *"Indeed, strength is (in) archery."*[1] Allah, Exalted be He, states in the Qur'ân that the brothers of Yûsuf (Joseph) said, ***"...indeed we went racing each other..."*** (Qur'ân: Yûsuf: 17), i.e. competing with each other through archery or running. Abû Hurayrah also narrated that the Prophet (PBUH) said:

"No (reward should be given for) a competition except that made between (animals with) hoofs (like camels), or (those with) cloven hoofs (like horses) or (arms with) blades (in fencing)."

(Related by the Five Compilers of *Hadith*)[2]

This *hadith* shows that entering competition for seeking a certain reward is permissible.

Many scholars stated the unanimous juristic agreement on the permissibility of racing and contests. **Shaykul-Islâm Ibn Taymiyah** (may Allah have mercy on him) said:

"Horseracing and archery and suchlike warlike contests enjoined by Allah and His Messenger (PBUH) are permissible, as they are useful in jihâd (fighting in the Cause of Allah)."

He also said:

"Wrestling, running races and the like are acts of obedience (to Allah) if they are intended for rendering Islam victorious, and taking reward (or prize) for winning them is also permissible."[3]

Such sports are permissible if there is no harm in them. **Ibn Taymiyah** also said:

"Whatever distracts one from performing what Allah has ordained is prohibited – even if it is originally permissible – such as selling, trading and all other activities the idle divert themselves with, and all kinds of sports that do not help in achieving a legal purpose; all such acts are prohibited."[4]

Scholars paid such great attention to this issue that they used to specify a chapter in their well-known volumes and writings for it, entitling it "Chapter on Heroism."

Heroism Is of Four Kinds:

1-Horsemanship contests and how to attack and retreat with horses

2-Archery contests or their equivalents according to every age

3-Spear throwing and marksmanship contests

4-Fencing contests

Whoever excels in these four kinds has completed the aspects of heroism. It is permissible to race on foot (as in running races) or using any riding or pack animals. **Imâm Al-Qurtubî** (may Allah have mercy on him) said:

> *"There is no disagreement on the permissibility of horsemanship racing, racing through other riding beasts, and foot racing (such as running). Similarly, archery contests and other weapon contests are permissible, for these are all considered training for fighting in the Cause of Allah."*[5]

The Prophet (PBUH) raced with `Â'ishah (may Allah be pleased with her)[6] and wrestled with Rukânah and beat him[7]. Salamah Ibnul-Akwa` also raced with a man from the *Ansâr*[8] in the presence of the Messenger of Allah (PBUH)[9].

The competition for a certain reward (or prize) is impermissible except in camel-riding races, horsemanship, and archery contests, for the Prophet (PBUH) said:

> *"No (reward should be given for) competition except that made among (animals with) hoofs (like camels), or (those with) cloven hoofs (like horses) or (arms with) blades (in fencing)."*
>
> (Related by the Five Compilers of *Hadîth* on the authority of Abû Hurayrah)

This means that it is impermissible to get a reward (or a prize) for a competition except for camel-riding races, horsemanship, and archery contests, for these are the tools of war the Prophet (PBUH) enjoined Muslims to learn and master. The meaning of the aforesaid *hadîth* is that it is impermissible to receive prizes for other kinds of competitions. The *hadîth* may also mean that these three are the worthiest kinds of competitions to be practiced due to their significant and general benefits. Thus, we can say that every competition that benefits religion is permissible, as indicated in the story of Abû Bakr and Rukânah[10].

Imâm Ibnul-Qayyim said:

> *"As for betting on the victory of Islam or the materialization of any of its signs, as done by Abû Bakr As-Siddîq, it is the worthiest kind of competition, and it is more entitled to be permitted than betting through marksmanship, horsemanship and camel-riding racing. It is the worthiest and most significant sort of competition with regard to the benefits it achieves to religion."*[11]

There are Five Conditions for a Competition to be Valid

1- Specifying the riding animals through seeing them

2- The riding animals have to be of the same kind. Contestant archers are also to be specified, as the purpose behind the exercise is to find out their competence and skill in archery.

3- Specifying the distance, so as to identify the winner (in running races) and the skilled sharpshooter (in archery or the like). The beginning and the end of the race have to be clearly identified and agreed upon, for the purpose is to know who will win, and this will not be achieved except through complete equality in their aims.

4- The prize should be known and should be something lawful.

5- The competition has to be completely free from gambling; that is, the reward (prize) should be offered by someone else, other than the contestants, or by only one contestant. If the prize belongs to the contestants, permissibility of the matter is disputable, i.e. whether it is permissible or not except with a *muhallil* (a non-contestant who shares in case of profit and does not share in case of loss). **Shaykhul-Islâm Ibn Taymiyah** (may Allah have mercy on him) chose not to stipulate a *muhallil*,[12] and said:

"Non-taking a muhallil is worthier and fairer than having the reward (prize) from one of the contestants. It also helps more to achieve the aim of both contestants which is proving the incompetence of the other. Having a financial reward in this way is permissible."

Ibn Taymiyah concluded saying:

"I do not know of any of the Prophet's companions who stipulated a muhallil (in contests). It was only known to have been done by Sa'id Ibnul-Musayyib, after whom people take this convention."[13]

Due to the above, we can conclude that the permissible competition is of two kinds:

1) Competition that accomplishes a legal Islamic benefit, like training for *jihâd* and seeking knowledge

2) Competition which is intended for entertainment in which there is no harm

The first kind is the one in which it is permitted to receive a prize within the aforementioned conditions. However, the second type of competition is permissible provided that it does not distract one from a duty or divert one from remembering Allah or offering prayer. Yet, it is impermissible to get a prize for the latter kind of contests. Unfortunately, people nowadays waste a lot of their time and money in that kind of entertaining contests which are of no benefit to Muslims. We seek refuge with Allah, and there is no power or strength save in Him.

Endnotes

1 Muslim (4923) [7/65].

2 Abû Dâwûd (2574) [3/46], At-Tirmidhi (1704) [4/205], An-Nasâ'i (3591) [3/536], Ibn Mâjah (2878) [3/400] and Ahmad (7476) [2/256].

3 See: "*Al-Akhbâr Al-`Ilmîyyah min Al-Ikhtiyârât Al-Fiqhiyyah*" (p. 233)

4 The previous source.

5 See: "*Tafsîr Al-Jâmi`*" [9/146].

6 Abû Dâwûd (2578) [3/48] and Ibn Mâjah (1979) [2/479].

7 Abû Dâwûd (4078) [4/221] and At-Tirmidhi (1789) [4/247].

8 The *Ansâr*: the Supporters; the inhabitants of Medina who had accepted Islam and supported the Prophet (PBUH) and all the *Muhâjirûn* (the Emigrants) upon their arrival there.

9 Muslim (4654) [6/382].

10 When the Persians defeated the Byzantines, Allah revealed:

"The Byzantines have been defeated - in the nearest land. But they, after their defeat, will overcome - within three to nine years..." (Qur'ân: Ar-Rûm: 2 – 4)

Therefore, Abû Bakr bet the disbelievers of Quraysh that the Byzantines would defeat the Persians according to the verse.

11 See: "*Ar-Rawd Al-Murbi`*" [5/350].

12 See: "*Al-Akhbâr Al-`Ilmîyyah min Al-Ikhtiyârât Al-Fiqhiyyah*" (p. 233).

13 See the footnote in "*Ar-Rawd Al-Murbi`*" [5/353-354].

CHAPTER

4

Lending Something for Use (`*Âriyah*)

Faqihs (may Allah have mercy on all of them) define `*âriyah* as a permission for benefiting from an article whose use is permissible, and then the borrowed article remains until it is returned to its owner.

The aforesaid definition excludes whatever is impermissible to use, for such a thing is naturally prohibited to be lent. It also excludes any object that cannot be used without being consumed, such as food and drink.

Lending objects for use is legal according to the Qur'ân, the *Sunnah* (Prophetic Tradition), and juristic consensus:

- Allah, Exalted be He, states in the Qur'ân that He damns those who ***"...withhold [simple] assistance."*** (Qur'ân: Al-Mâ`ûn: 7) The verse refers to those who withhold the different wares and articles that people use and lend each other. Those who abstain from lending such

objects to people in dire need of them are dispraised in the above-mentioned verse that proves the obligation of lending as maintained by Shaykhul-Islâm Ibn Taymiyah (may Allah have mercy on him), provided the owner of the needed object is well-to-do[1].

- It is stated in the *Sunnah* that the Prophet (PBUH) borrowed a horse from Abû Talhah[2] and also borrowed shields from Safwân Ibn Umayyah[3].

Lending something to someone who badly needs it is regarded as an act of obedience to Allah, for which the lender will be greatly rewarded by Allah. This is because it falls under the general meaning of mutual assistance and cooperation in righteousness and piety.

There are Four Conditions for the Validity of Lending

1) The legal competence of the lender to lend, as lending is a kind of donation which is invalid to be done by a minor, an insane person, or a foolish and weak-minded one.

2) The legal competence of the borrower to be lent; he must be legally competent to accept the terms of the agreement (to give the lent article back).

3) The permissibility of using the lent object; for example, it is impermissible for a Muslim to lend a Muslim slave to a disbeliever. Similarly, it is impermissible to lend a hunting tool to one in the state of *ihrâm* (ritual consecration during *Hajj* or *'Umrah*); Allah, Exalted be He, says, "***...but do not cooperate in sin and aggression...***" (Qur'ân: Al-Mâ'idah: 2).

4) The lent article must remain as it is after use, not to be consumed as mentioned above.

The loaner can retrieve the lent object whenever he wishes unless it results in causing harm to the borrower, as, for example, when a person lends something that causes damages to the borrower if it is reclaimed by the loaner while it is being used. To illustrate, if someone lends another a ship to carry his goods, he cannot reclaim it so long as it is in the sea. Another example is that if someone permits another to use his wall to support his wood on, the owner may not reclaim his wall as long as the wood is on it.

The borrower must preserve the loan more than he preserves his own money, so as to give it back to its owner undamaged. Allah, Exalted be He, says:

"Indeed, Allah commands you to render trusts to whom they are due..." (Qur'ân: An-Nisâ': 58)

This verse proves the obligation of rendering back trusts, including loans, safe to their owners. Moreover, the Prophet (PBUH) said:

"The hand (referring to man) has to give back what it had taken (by means of borrowing, stealing, etc.)."[4]

He (PBUH) also said:

"Render the trust to him who entrusted you (with it)."[5]

The above legal texts prove the obligation of safekeeping whatever one is entrusted with and returning it in a good condition to its owner. Loans are indicated in the general meaning of these texts, as the borrower is in fact entrusted with what he borrows and he is obliged to return it; he is only permitted to use it within the limits of usual usage. Thus, it is impermissible for a borrower to overuse the borrowed object in a way that may damage it, nor is he permitted to use it unsuitably or improperly, for he is not given permission to use it that way. Allah, Exalted be He, says:

"Is the reward for good [anything] but good?"
(Qur'ân: Ar-Rahmân: 60)

If the borrower uses the loan for any purpose other than that for which it has been lent and thus it is damaged, he has to compensate for it, as the Prophet (PBUH) said:

"The hand (referring to man) has to give back what it had taken (by means of borrowing, stealing, etc.)."

(Related by the Five Compilers of *Hadîth*, and Al-Hâkim regarded it as a *sahîh* (authentic) *hadîth*)

This *hadîth* proves the obligation of returning whatever one has borrowed from another, and that one is not free from this duty except through returning the loan to its owner or to someone on his behalf.

However, if the borrowed object is damaged while being properly used, the borrower is not financially liable for it, as the lender has permitted him for such proper utilization. Thus, the borrower is not obliged to make up for any damage resulting from such permitted use.

It is impermissible for the borrower to lend the borrowed thing, because whoever is permitted to use something is not permitted to lend it to someone else, for this will subject it even more to be damaged.

Scholars disagree on the obligation of the borrower's liability for the damage of the loan due to misuse. Some scholars maintain that it is obligatory for the borrower to make up for the damaged loan, whether he has used it properly or not. They base their opinion on the general meaning of the following *hadîth*: the Prophet (PBUH):

> *"The hand (referring to man) has to give back what it had taken (by means of borrowing, stealing, etc.)."*

This applies, for example, when the borrowed beast dies, the borrowed garment is burned, or the borrowed object is stolen. However, some scholars are of the opinion that a borrower is not financially liable for the loan so long as he has not transgressed in its utilization; he is liable for it only when he misuses it. Perhaps this is the most likely opinion, as the borrower gets the loan with the permission of its owner, so it is regarded as a trust kept by him.

The borrower has to safeguard the loan, care for it, and return it to its owner as soon as he achieves the purpose of borrowing it. He should by no means be negligent in using it or expose it to damage. This is because the loan is regarded as a trust kept by the borrower, and its owner is supposed to have done good to him; Allah, Exalted be He, says:

> ***"Is the reward for good [anything] but good?"***
>
> (Qur'ân: Ar-Rahmân: 60)

Endnotes

1 See: "*Al-Akhbâr Al-'Ilmiyyah min Al-Ikhtiyârât Al-Fiqhiyyah*" (p. 231).
2 Al-Bukhâri (2627) [5/296] and Muslim (5962 [8/67].
3 Abû Dâwûd (3562) [3/526].
4 Abû Dâwûd (3561) [3/526], At-Tirmidhi (1269) [3/566], Ibn Mâjah (2400) [3/138] and Al-Hâkim (2357) [2/60].
5 Abû Dâwûd (3535) [3/516] and At-Tirmidhi (1267) [3/564].

CHAPTER

5

Usurpation

According to the *faqîhs*, usurpation refers to usurping other's possessions by force without having the right to take them.

Usurpation is prohibited according to juristic consensus, for Allah, Exalted be He, says:

> ***"And do not consume one another's wealth unjustly..."***
>
> (Qur'ân: Al-Baqarah: 188)

Usurpation is considered one of the grievous ways of eating up money unjustly, for the Prophet (PBUH) said:

> *"Verily, your blood, property and honor are sacred to one another (as Muslims)."*[1]

He (PBUH) also said:

> *"The property of a Muslim is not lawful (to be taken) except by his consent."*[2]

The usurped wealth could be real estate or a movable property; the Prophet (PBUH) said:

> *"If anyone extorts a span of land unjustly, his neck will be encircled with it down seven earths (on the Day of Resurrection)."*[3]

A usurper has to repent to Allah, Almighty and Ever-Majestic be He, and return whatever he has extorted to its rightful owners, asking them for forgiveness. The Prophet (PBUH) said:

> *"Whoever wrongs anyone in a matter that concerns his honor or any other matter should ask his forgiveness as soon as possible, before a time comes when there is neither dinar nor dirham (i.e. before the Day of Resurrection when wealth cannot compensate for one's wrongdoing); if the usurper has good deeds, they will be taken from him according to his usurpation, and if he has no good deeds, the sins of the oppressed person will be loaded on him."*[4]

If the usurped property is available, he should return it in the same condition he has taken it, but if it is damaged, he should return its equivalent.

Imâm Al-Muwaffaq said:

> *"Scholars unanimously agree that it is obligatory to return the usurped property if it is still in the same condition and unchanged."*[5]

Furthermore, the usurper has to pay back the usurped property along with the profit he has made through it, be it connected with the property or separated. This is because the profit is the outcome of what has been taken unjustly, so it belongs to its rightful owner just like the original usurped property.

If the usurper has built on the usurped land or has planted vegetation therein, he has to remove the building or the crop in the case the rightful owner demands so. The Prophet (PBUH) said:

> *"The unjust root (planted in someone's land without his permission) has no right."*
>
> (Related by At-Tirmidhî and other compilers of *Hadîth*; At-Tirmidhî regarded it as a *hasan* (good) *hadîth*)[6]

If so doing will negatively affect the land, the usurper has to compensate for the damage. He has also to remove the remains of the crop or the structure so that he may deliver the land in good condition to its rightful owner.

The usurper has also to pay a compensation for using the land from the date of its usurpation until its delivery, as he has unrightfully prevented its owner from using it during that period. Moreover, if the usurper withholds the usurped property until its value and price are reduced, he has to pay it back according to its original price according to the sound opinion in this regard.

On the other hand, if the usurped object is mixed with something else that can be distinguished from it - like wheat and barely - the usurper has to separate what he has usurped and return it. If he has mixed it with something that cannot be distinguished, such as mixing wheat with wheat, he has to pay back the usurped object in measure or weight. Yet, if he has mixed the usurped object with something of inferior or superior quality, or with something different but indistinguishable, the mixture is to be sold and each one of them is to be given his share of the price. In this case, if the value of usurped property is less in the mixture than its value when unmixed, the usurper has to compensate the owner for the decrease in its price.

Among the juristic opinions in this connection is that whoever takes the usurped property from the usurper is financially liable for it in case it is damaged in his possession.

There are ten examples of people who may take a usurped property from the usurper:

1. One who may buy the usurped object from the usurper or the like.
2. One who may rent the usurped object from the usurper.
3. One who may be granted the usurped object by the usurper gratis.
4. One who may take possession of the usurped object on behalf of the usurper such as a trustee or a deputy.
5. One who may borrow the usurped object from the usurper.
6. One who may usurp the usurped object from the first usurper.
7. One who may have the usurped object at his disposal, such as a speculator on behalf of the usurper.
8. One who may marry an appropriated bondmaid from her usurper.
9. One whom the usurper may grant, not sell him, the usurped object as a compensation for something.
10. One who may damage the usurped object while having it on behalf of the usurper.

In all these cases, if the second party is aware that the object is originally usurped, he becomes financially liable for it for obtaining something without the permission of its rightful owner. However, if he is unaware of that, the original usurper shoulders the liability.

If the usurped property is something that is usually rented, the usurper is to pay compensation estimated according to the period of his possession of the usurped property. This is because utilities represent assets, so they have to be paid for just like real estate.

All the dealings of a usurper on the usurped object are invalid, as they are carried out without the permission of the rightful owner.

If the usurper does not know the owner of the usurped object and thus is unable to return it to him, he should deliver it to the ruler (or the one in authority) to put it in its right place or give it in charity on behalf of its owner. In so doing, the real owner of the usurped object will get the reward of charity, and the usurper becomes free from the guilt.

The usurpation of a property is not limited to taking it by force; it rather includes seizing it through unjust disputes and false oaths. Allah, Exalted be He, says:

> ***"And do not consume one another's wealth unjustly or send it [in bribery] to the rulers in order that [they might aid] you [to] consume a portion of the wealth of the people in sin, while you know [it is unlawful]."*** (Qur'ân: Al-Baqarah: 188)

Allah also says:

> ***"Indeed, those who exchange the covenant of Allah and their [own] oaths for a small price will have no share in the Hereafter, and Allah will not speak to them or look at them on the Day of Resurrection, nor will He purify them; and they will have a painful punishment."*** (Qur'ân: Âlu `Imrân: 77)

In fact, the Divine command is so strong and binding, and the punishment of violating it is so severe.

Moreover, the Prophet (PBUH) said:

> *"If anyone extorts a span of land unjustly, his neck will be encircled with it down seven earths (on the Day of Resurrection)."*[7]

He (PBUH) also said:

> *"If I gave some one's right to another (mistakenly because of the latter's tricky presentation of the case), he (the latter) should never take it, for I would be really giving him a piece of fire."*[8]

Endnotes

1 Muslim (2941) [4/402].
2 Abû Ya`lâ in his *'Musnad'* (1570) [3/140].
3 Muslim (4108) [6/49]. See also Al-Bukhârî (3198) [6/352] and Muslim (4110) [6/50].
4 Al-Bukhârî (2449) [5/126].
5 See: "*Al-Mughnî*" and "*Ash-Sharh Al-Kabîr*" [5/374].
6 At-Tirmidhî (1382) [3/662] and Abû Dâwûd (3073) [3/297-298].
7 Abû Dâwûd (3073) [3/297] and At-Tirmidhî (1382) [3/662]. See also Al-Bukhârî [5/23].
8 Al-Bukhârî (2680) [5/354] and Muslim (4448) [6/231].

CHAPTER

6

Damage and Damages

Allah has prohibited usurping other people's property and has imposed liability for whatever is damaged of the property taken without right even if by mistake. Whoever damages another's property – and this being considerable – without its owner's permission, is financially liable to make up for it.

Imâm Al-Muwaffaq said:

> *"There is no juristic disagreement in this regard, whether the damage is intentional or not, and whether the one causing it is legally accountable or not."*

Similarly, whoever causes the damage of another's wealth is financially liable for it. For example, when one opens a gate causing what is locked in to be lost or stolen, or when one unfastens a container causing what is therein to be wasted and damaged, one is liable for them. Likewise, if someone ties a riding animal in a narrow street causing a passerby to stumble and be harmed or injured, he has to pay him for the damage caused. This is exactly like the

one who parks a car in the middle of the street and as a result another car or a person is hit, whereby damage is caused, the one who has parked the car is liable to make up for the damage. This opinion is based on the *hadith* related by Ad-Dâraqutnî and other compilers of *Hadith* that states:

> *"If one ties a riding animal in one of the pathways of the Muslims, or in one of their markets, and it treads on someone (or something) by one of its front or back legs, one is liable for it."*[1]

The same ruling applies when one leaves clay, a piece of wood or a stone in a pathway or digs a hole in it, causing harm or injury to a passerby. In the same way, if someone throws watermelon peels or lets water in the street, causing a passerby to slip and get injured, he is to make up for it. People who do all such actions are financially liable for the resulting damage, as such deeds are regarded as transgression.

Unfortunately, there are many such instances of carelessness everywhere nowadays; too many holes are heedlessly dug on the roads and streets, too many blocks and obstacles are put therein, and too much damage is caused by that heedlessness due to the lack of control and supervision. Some people may even occupy streets as if they were their own, dedicating them for their own use, causing harm to those passing by without caring for the sins they are committing in this way or the punishment that awaits them.

Among the matters that incur financial liability is when one has a mad dog that assaults the passersby or bites any of them. The owner of the dog is liable to make up for the resulting damages or injuries, for having such a dog is an act of transgression. On the other hand, if someone digs a well in his courtyard for his own benefit, he is financially liable for any damage that might be caused through it; he is obliged to keep it in a condition that prevents harming the passersby. However, if he leaves it without such precautions, he is deemed a transgressor.

Moreover, if someone owns cattle, he is obliged to keep them away from damaging other people's crops especially at night; otherwise he is financially liable for whatever they damage. The Prophet (PBUH) judged in such a case:

> *"The owners of property (i.e. cattle) should keep it during the daytime and they are liable for the damages they (the cattle) cause during the nighttime."*
>
> (Related by Imâm Ahmad, Abû Dâwûd, and Ibn Mâjah)[2]

The owner of a domestic animal is not liable for it during the daytime, except if he releases it close to what it usually damages. **Imâm Al-Baghawî** (may Allah have mercy on him) said:

> *"Scholars maintain that the owners of grazing cattle are not liable for the people's properties they (the cattle) damage during the daytime. However, their owners are liable for whatever they damage during the night, for it is conventional that the owners of gardens and orchards are to protect them properly during the daytime while the cattle owners are to detain them during the nighttime. Thus, whoever breaks this habit has deviated from the convention. This is in case the owner of the cattle is absent, but if he is there, he has to pay for what his cattle have damaged."*[3]

In the Qur'ân, Allah mentions a story about Prophets Dâwûd (David) and Sulaymân (Solomon) and their judgment concerning a similar case of damage. Allah, Exalted be He says:

> ***"And [mention] David and Solomon, when they judged concerning the field – when the sheep of a people overran it [at night], and We were witness to their judgment. And We gave understanding of it [i.e. the case] to Solomon, and to each [of them] We gave judgment and knowledge..."*** (Qur'ân: Al-Anbiyâ': 78 -79)

Shaykhul-Islâm Ibn Taymiyah (may Allah have mercy on him) said:

> *"According to the Qur'ân, Sulaymân (Solomon) was clearly favored by understanding the wisdom of liability on equal terms. The sheep were grazing at night and damaged a grape orchard. Dâwûd judged that the shepherds should pay the exact value of the damage, and then he estimated the sheep and found that their value was equal to the compensation for the damage. Therefore, he gave judgment that all the sheep should be given to the owner of the orchard. However, Sulaymân judged that the owners of the sheep were liable for the damaged orchard and that they should pay its exact equivalent in compensation by cultivating the orchard until it returns to its original state. He did not also deprive the owners of the orchard of the crops that were supposed to be yielded from the time of damage until the time of recovery. Thus, Sulaymân gave the owners of the orchard the sheep so as to benefit from them as much as the sheep owners used to benefit from the orchard. In other words, they would utilize the shepherds' sheep in return for the fruits they missed of their orchard until the*

orchard was re-cultivated by the shepherds (in compensation). So, Sulaymân evaluated the two guarantees and found them equal, and that was an example of the knowledge Allah favored him with and the wisdom He praised him for."[4]

If an animal has been led or ridden by someone, he is liable only for whatever it damages with its front organs, such as the forelegs or the mouth. Yet, he is not liable for what is damaged by the animal's hind parts such as the hind legs, for the Prophet (PBUH) said:

"There is no compensation for whatsoever is damaged (or killed or injured) by a beast's leg."[5]

Shaykhul-Islâm Ibn Taymiyah (may Allah have mercy on him) said:

"The injuries or damages caused by animals like cows, sheep, and the like are not to be compensated (by the owner) if they are off a leash. This occurs, for example, when an animal breaks loose from the person leading it and then causes damage. In this case, there is no financial liability on the owner for the damage provided that the animal is not used to biting and that its owner has not been negligent in detaining it at night and keeping it away from market places and people's gatherings."

The same opinion is maintained by some other scholars, who state that there is no compensation (for the damage caused) if the animal escapes and wanders about aimlessly without a leader or a rider, unless it is a wild beast[6].

In addition, if someone is attacked by a human being or an animal, and killing then is the only way to stop them, there will be no compensation on that person in case he killed them. This is because killing here is a means of self-defense which is permissible, so there is no liability for its consequences. Moreover, the killing of an assaulter is intended to prevent its harm, so one will not be regarded as a killer when one kills it in self-defense. Rather, the assaulter itself will be regarded as a self-murderer in this case. **Sheikh Taqiyyud-Dîn** said:

"A person has to stop the assaulter, and if it cannot be stopped except by killing, it is permissible for the attacked person to do so according to the unanimous juristic agreement in this regard."[7]

Among the objects for which there is no compensation in case of damage are musical and entertainment instruments, crosses, wine containers, and books on misguidance, superstition, dissoluteness and profligacy. This is implied in the

hadîth related by Imâm Ahmad on the authority of Ibn 'Umar who narrated that the Prophet (PBUH) ordered him to get a knife and then he (PBUH) went to the markets of Medina, where there were leather containers of intoxicants brought from Ash-Shâm[8]. Ibn 'Umar added that those leather containers of wine were torn by knives in the presence of the Prophet (PBUH) who commanded his Companions to do the same[9]. This *hadîth* proves the commendableness of destroying such immoral things without anything in compensation. Still, this should be carried out under the control and supervision of authorities so as to guarantee public interests and prevent any evil or corruption resulting.

Endnotes

1 Ad-Dâraqutni (3352) [3/127] and Al-Bayhaqi (17693) [8/597].
2 Abû Dâwûd (3570) [3/530], Ibn Mâjah (2332) [3/101] and Ahmad (23581) [5/436].
3 See the footnote in "*Ar-Rawd Al-Murbi'*" [5/419].
4 See the footnote in "*Ar-Rawd Al-Murbi'*" [5/420].
5 Al-Bukhârî (1499) and Muslim (1710).
6 See the footnote in "*Ar-Rawd Al-Murbi'*" [5/422].
7 See: "*Al-Akhbâr Al-'Ilmiyah min Al-Ikhtiyârât Al-Fiqhiyyah*" [p. 420].
8 Ash-Shâm: The Levant; the region covering Syria, Lebanon, Jordan, and Palestine.
9 Ahmad (6165) [2/132-133].

CHAPTER

7

Trusts

According to the *Sharî'ah* (Islamic Law), entrustment is deputing someone for the voluntary preservation of something, committing it into his care. "Trust" refers to the property the trustee is entrusted with safekeeping without recompense.

The conditions of the validity of entrustment is the same as that of deputation, namely maturity, sanity, and puberty, for entrustment is deputation for the purpose of safekeeping.

It is desirable for one to accept to be entrusted with something if he knows himself to be honest enough and capable of keeping trusts. This is because safekeeping trusts has a great reward; the Prophet (PBUH) said:

> "... *And Allah helps a person so long as the person helps his (Muslim) brother.*"[1]

However, if one is not sure that he is capable of keeping trusts, it is detestable for him to accept them.

Among the rulings on entrustment is that if the trust is damaged while being in the care of the trustee who has not misused it, he will not be financially liable for it. This is because a trust is regarded as the trustee's own property, so he does not make up for it if it is damaged, provided he does not abuse it. Ibn Mâjah related a *hadith*[2] – which has a rather weak chain of transmitters – stating that the Prophet (PBUH) said:

> *"If one is trusted with something, then he is not liable for compensation (if it is damaged)."*

Ad-Dâraqutni related the same *hadith*[3] with the following wording:

> *"There is no compensation to be paid by an honest borrower (if the borrowed object is damaged), and there is no compensation to be paid by an honest trustee (if the trusted object is damaged)."*

In another narration:

> *"There is no compensation to be paid by the trustee (if the trusted object is damaged)."*[4]

A trustee keeps a trust voluntarily. So, if people are liable for the trusts they keep, they will refrain from safekeeping one another's trusts, which will negatively affect their dealings and hamper their interests. However, he who misuses a trust or neglects keeping it properly is liable to make up for it in case it is damaged, for he is regarded as a damager of another's property.

Another ruling on entrustment is that the trustee has to secure the trust just as he secures his own property, for Allah, Exalted be He, has commanded us to render trusts safe to their owners. Allah says:

> ***"Indeed, Allah commands you to render trusts to whom they are due..."*** (Qur'ân: An-Nisâ': 58)

Trusts cannot be rendered safe to their owners without preserving them, and when the trustee accepts the trust, he has obligated himself to keep it, so he has to fulfill his obligation.

If the trust is a beast, the trustee is to fodder it, but if he does not supply it with fodder without the permission of its owner, causing it harm, the trustee becomes liable to make up for it. This is because foddering animals is an obligation, in addition to the trustee's obligation to take care of the entrusted animal. Thus, the trustee is considered sinful if he stops providing it with food and water until it dies. Generally, one should provide such animals with fodder and water for the sake of Allah, Exalted be He, as their lives have inviolability.

It is permissible for the trustee to leave the trust with whomever he usually entrusts his own property, such as his wife, his slave, his treasurer, or his servant. In this case, if the trust is damaged while being in the care of anyone of them without the latter being negligent or transgressing, the trustee is not liable to make up for it. This is because it is permissible for a trustee to keep the trust by himself or by deputing someone trustworthy to keep it on his behalf. Likewise, if the trustee commits the trust to someone who already preserves the property of its owner honestly, he (the original trustee) becomes free from the obligation of safekeeping it, as the social convention goes. However, if the trustee delivers it to a person who is a stranger to him and to the owner of the trust, he becomes liable for compensation in case it is damaged. This is because he is not to entrust it with anyone else unless there is a compelling excuse. For example, if the trustee is breathing his last, or if he has suddenly to travel and fears that the trust might get damaged if he takes it with him, and there is no one else but a stranger to entrust it with, there is no sin on him in such cases. In addition, he will not be liable for it in case it is damaged.

Generally, if the trustee is worried about the trust, or if he wants to travel, he has to render the trust to its owner or his deputy. If he does not find any of the two, he is to take it with him on his journey if this is the safest way. If not, he is to deliver it to the ruler (or the one in authority) for the latter is a substitute for the owner in his absence. If the trustee cannot entrust it with the ruler (or the one in authority), he is to entrust it with a trustworthy person. To illustrate, when the Prophet (PBUH) wanted to immigrate to Medina, he committed the trusts he had to Umm Ayman (may Allah be pleased with her), and commanded `Alî Ibn Abû Tâlib to return them to their owners[5]. Similarly, if the trustee is dying, he has to render the trusts to their owners, and if he does not find them, he is to deliver them to the ruler (or the one in authority) or to a trustworthy person.

Abusing a trust obligates the trustee to compensate for it in case it is damaged. For example, one maybe entrusted with a riding animal but rides it unnecessarily, entrusted with a garment but wears it for a purpose other than preserving it from clothes moth, or entrusted with some money in a coin purse but takes the money out of it or unfastens the purse. In such cases, the trustee is liable for compensation if the trust is damaged, as he transgresses others' property in so doing.

The trustee is supposed to be an honest and trustworthy person, so if he says that he has rendered the trust to its owner or to someone on his behalf, he is to be believed. Moreover, if the trustee claims that the trust is damaged without misusing it and he swears an oath, he is to be believed. This is because a trustee is supposed to be a trustworthy person, whose attribute is derived from "trust". Allah, Exalted be He, says:

> ***"Indeed, Allah commands you to render trusts to whom they are due..."*** (Qur'ân: An-Nisâ': 58)

The original ruling is that a trustee is trustworthy and innocent until proven to be lying. On the other hand, if the trustee claims that the trust is damaged due to an accident like fire, his claim is not to be accepted until he brings evidence that such an accident has happened.

Finally, if the owner of the trust asks the trustee to render it to him but the trustee delays it for no excuse until it is damaged, he is liable to compensate for it, because he has committed something prohibited, namely withholding the trust from its owner. And, Allah knows best.

Endnotes

1 Muslim (2699).
2 Ibn Mâjah (2401) [3/138].
3 Ad-Dâraquṭnî (2939) [3/36].
4 Ad-Dâraquṭnî (3938) [3/36].
5 Al-Bayhaqî (12696) [6/472].

IV:RECLAMATION OF WASTELANDS AND....

CHAPTER

1

Reclamation of Wastelands

Faqîhs[1] (may Allah have mercy on them) define a wasteland as a land which is not reserved for utilities or possessed by a legally protected owner. This definition excludes two kinds of lands:

1- **Private land:** a land owned by a legally protected Muslim or disbeliever, whether he bought it, took it as a gift, or the like.

2- **Public land:** a land reserved or specified for the benefit of private properties, such as roads, yards, and watercourses, or reserved for the utility of the residents such as cemeteries, garbage dumps, areas reserved for performing the prayers of the Two Feasts (*'Îds*), places of firewood, and pastures. All such kinds of land cannot be legally possessed by means of reclamation.

If the land which is not possessed by any legally protected owner is reclaimed by someone, it belongs to him due to the following *hadîth* narrated by Jâbir (may Allah be pleased with him) in which the Prophet (PBUH) said:

"If anyone brings a barren land into cultivation, then it belongs to him."[2]

(Related by Imâm Ahmad, and At-Tirmidhi who deemed it a *sahih* (authentic) *hadith*)

There are other *hadiths* having the same meaning; some of them are recorded in *Sahih Al-Bukhâri (Al-Bukhâri's Authentic Book of Hadith)*.

All *faqihs* agree that the wastelands can be possessed by those who reclaim them, except the wastelands of Al-Haram (the Sanctuary of Mecca) and the area of 'Arafah (Mount), so as not to narrow the places specified for the pilgrims to perform the rituals of *Hajj* or occupy a place specified for all people. However, *faqihs* differ in determining the conditions required to make valid the reclamation of a barren or ownerless land.

A Wasteland can be Legally Possessed in Some Ways

First: When a person surrounds a wasteland with an invulnerable wall, it becomes his, for the Prophet (PBUH) said:

"If anyone surrounds a land (i.e. a wasteland) with a wall, then it belongs to him."[3]

(Related by Imâm Ahmad and Abû Dâwûd on the authority of Jâbir, and Ibnul-Jârûd deemed it a *sahih* (authentic) *hadith*)

There is another *hadith* narrated on the authority of Samurah carrying the same meaning, stating that when a person surrounds a barren or ownerless land with a wall, it becomes his, provided that such a wall is strong and impregnable enough. However, if a person just puts stones or earth around a wasteland, or surrounds it with a low fence or a small wall that does not prevent intruders, or digs a trench around it, the land still does not belong to him, yet he is more entitled to reclaim it. Moreover, it is impermissible for one to sell a wasteland unless one has fully reclaimed it.

Second: If a person digs a well in a wasteland until he reaches water, then it belongs to him as he has reclaimed it. However, if one digs a well without getting any water, the wasteland does not belong to him, though he is still more entitled to reclaim and own it since he has started its reclamation.

Third: If a person supplies a wasteland with water from a well or river, he thus has reclaimed it, as providing water is more useful to the land than surrounding it with a wall.

Fourth: If there is water that overflows into a wasteland and causes it to be infertile, one who prevents or drains such water is considered to be reclaiming the wasteland, and thus it becomes his. This is because this kind of reclamation is more useful to the land than surrounding it with a wall – which makes one owns it according to the aforementioned *hadîth*.

Some scholars maintain that there is no general rule to determine the cases in which a wasteland is deemed reclaimed, and that a Muslim must adhere to the common convention in this regard. What people conventionally consider to be reclamation of a wasteland entitles one who does it to possess the land. This is the opinion maintained by a group of the Hanbalî scholars and others. The *Sharî'ah* (Islamic Law) states as a general rule that a wasteland is owned by whoever reclaims it, without elaboration. So, a Muslim must refer to the common convention to find out what is deemed reclamation and what is not.

The Imâm of Muslims (the ruler or the one in authority) is permitted to grant the wasteland to whoever reclaims it, for the Prophet (PBUH) granted the Valley of Al-'Aqîq (in Medina) to Bilâl Ibnul-Hârith[4] and a land in Hadramawt to Wâ'il Ibn Hujr[5]. The Prophet (PBUH) also granted fiefs to 'Umar Ibnul-Khattâb,[6] 'Uthmân Ibn 'Affân,[7] and a group of Companions[8] (may Allah be pleased with them all). Still, the one who is granted a wasteland as a fief does not own it until he reclaims it so as to become worthier than others to possess it. Thus, if the one granted the wasteland reclaims it, then it belongs to him. Yet, if he cannot, the Imâm is permitted to re-take the wasteland and grant it to someone else able to reclaim it, for 'Umar Ibnul-Khattâb (may Allah be pleased with him) took back the fiefs from those who could not reclaim them[9]. Likewise, if one takes possession of a game animal, firewood or the like before others do, one becomes more entitled to possess it, provided that he gets it first.

If a natural watercourse, such as that of a river or a valley, passes through people's lands, it is permissible for those by whose lands the water passes first to irrigate their lands withholding water from others until it gathers and its height becomes equal to that of one's ankles. Then, they should allow it to flow to those next to them, and so on and so forth. The Prophet (PBUH) said to Zubayr on a similar occasion:

"O Zubayr! Irrigate (your land) and then withhold the water until it reaches the walls between the pits round the trees."[10]

(Related by Al-Bukhâri and Muslim)

`Abdur-Razzâq related that Ma`mar reported that Az-Zuhri said:

"When we considered the Prophet's words, '...then withhold the water until it reaches the walls between the pits round the trees,' we found out that the height (meant in the hadîth) equals that of one's two ankles."[11]

Thus, they measured the amount of water described in the *hadîth* and found out that it was as high as the ankles; then they made this amount a measurement to determine the target amount of water after which everyone should allow water to flow to his neighbors to irrigate from it successively. `Amr Ibn Shu`ayb narrated that the Prophet (PBUH) said about the torrents of Mahzûr (a well-known valley in Medina):

"It (water) should be withheld until its height becomes equal to that of one's ankles, then let the water descend from the higher land next to which water passes first to the lower (land)."[12]

(Related by Abû Dâwûd and other compilers of *Hadîth*)

If the water is owned by some landowners, it should be divided among its owners according to their properties, and each owner is permitted to do whatever he likes to his water share.

The Imâm of Muslims (the ruler or the one in authority) has the right to protect the pasture reserved for grazing the cattle belonging to the Muslims' Public Treasury, such as the horses of *jihâd* (fighting in the Cause of Allah) and the camels of charity, as long as this does not narrow the public areas. Ibn `Umar (may Allah be pleased with him) narrated that the Prophet (PBUH) specified a place called An-Naqi` as a protected area for (grazing) the horses of Muslims[13]. So, as long as he does not narrow the Muslims' public places and it is needed, it is permissible for the Imâm to protect the grass grown in a wasteland for the grazing of the camels of charity, the horses of Muslim fighters, the cattle of *jizyah*,[14] and the straying and wandering cattle.

Endnotes

1 *Faqîh*: A scholar of Islamic Jurisprudence.

2 Ahmad (14205) [3/304] and At-Tirmidhî (1383) [3/663]. A similar *hadîth* was narrated by Sa'îd Ibn Zayd and related by Abû Dâwûd (3073) [3/297] and At-Tirmidhî (1382) [3/662].

3 Ahmad (20003 vol.2) [5/11] and Abû Dâwûd related a similar *hadîth* from Samurah (3077) [3/298].

4 Al-Bayhaqî (11824) [6/246]. It was related in another wording by Abû Dâwûd (3061) [3/291] and Al-Bayhaqî (11797) [6/240].

5 Abû Dâwûd (3058) [3/291] and At-Tirmidhî (1381) [3/665].

6 Al-Bayhaqî (20394) [10/212].

7 Al-Bayhaqî (11795) [6/239].

8 See: Al-Bayhaqî [6/238].

9 As he took back the fief of the Valley of Al-'Aqîq from Bilâl Ibnul-Hârith; Al-Bayhaqî (11824) [6/246].

10 Al-Bukhârî (2359) [5/44] and Muslim (6065) [8/107].

11 Al-Bukhârî [5/49] in the last part of the *hadîth* no. (2362).

12 Abû Dâwûd (3639) [4/36] and Ibn Mâjah (2481) [3/181].

13 Al-Bayhaqî (11808) [6/242] and its origin was related in Al-Bukhârî (2370) [5/56].

14 *Jizyah*: A tribute or a tax required of non-Muslims living in an Islamic state exempting them from military service and entitling them to the protection of the Islamic state. Concurrently, *Zakâh* is not taken from them, being an obligation only upon Muslims.

CHAPTER

2

Job Wages (*Ja'âlah*)

According to the *Sharî'ah* (Islamic Law), job wages refer to the wage given to someone for some help or work he does. In other words, they refer to the fixed amount of money given by someone to another for the latter's performance of a certain task, such as erecting a wall.

The permissibility of job wages is demonstrated in the Qur'ân; Allah, Exalted be He, states in the Qur'ân that Yûsuf (Joseph) said:

> ***"...and for he who produces it is [the reward of] a camel's load, and I am responsible for it."*** (Qur'ân: Yûsuf: 72)

The meaning is that whoever reports about the thief who has stolen the measure of the king will get a camel's load as a job wage. Thus, the aforesaid Qur'anic verse implies the permissibility of giving wages. Its permissibility is also stated in the *Sunnah* (Prophetic Tradition) through the *hadîth* about the stung person narrated on the authority of Abû Sa'îd in the Two *Sahîhs*[1] and in other books of *Hadîth*. Abû Sa'îd Al-Khudrî (may Allah be pleased with him) narrated:

"Some of the Prophet's Companions went on a journey until they reached some of the Arab tribes (at night). They asked the latter to treat them as their guests but they refused. The chief of that tribe was then bitten by a snake (or stung by a scorpion) and they (his people) tried their best to cure him but in vain. They went to the group of the Companions and asked whether they had a treatment or not. One of them replied, 'Yes, by Allah! I can recite a religious incantation for cure (ruqyah), but as you have refused to accept us as your guests, I will not recite the religious incantation for you unless you fix for us some wages for it.' They agreed to pay them a flock of sheep, so he (that Companion) went with them and kept blowing and reciting the Sura of Al-Fâtihah (the Opening Chapter of the Qur'ân) over the stung man who became all right as if he was released from a chain (i.e. showing no signs of sickness). Thereupon, they paid them (the Companions) the wage they agreed to pay. After that, they (the Companions) came to the Prophet (PBUH) and narrated the whole story to him, upon which he (PBUH) said, 'You have done the right thing. Divide it (the wage) among yourselves and assign a share for me as well.'"[2]

If the person performs the work for which a certain wage is specified, then he deserves it, for the agreement is validated by the performance of the specified task. If a group of workers performs the task, the wage is to be equally divided among them, for they participate in performing the same job for which the specified wage is paid. Whoever works when no wage is stipulated does not deserve anything, as it is considered a task performed without the permission of the employer, and thus the worker does not deserve any wage or reward. However, if the wage is stipulated after he has started the work, the worker deserves only the appropriate amount of the wage according to the work done after the stipulation of the wage.

Giving wages to a worker is a permissible agreement. Therefore, both parties, the worker and the employer, are entitled to cancel it. If the worker cancels the agreement, he deserves no wage or reward, for he thus drops his own right. However, if the employer cancels the agreement after the worker starts, the worker deserves an appropriate portion of the wage according to what he has already performed, for which compensation is due. Giving wages (*ja'âlah*) is different from hiring people's services (*ijârah*) in some aspects, among them are the following:

- In job wages, it is not a prerequisite for the validity of the agreement to specify accurately the task for the worker to perform in return for the wage. Yet, specifying the service is a condition for the validity of hiring (*ijârah*).
- It is not a condition for the validity of wages to specify a certain period for the task to be done in return for the wage, unlike hiring whose validity stipulates that the period of work must be specified.
- It is permissible in job wages to stipulate both the task and the period during which this task is to be performed. For example, one can say, "Whoever sews this garment for me in one day deserves such and such as wages". In such a case, if the worker sews the garment in one day, he deserves the specified wage; otherwise, he deserves nothing. However, in hiring, it is impermissible for the employer to stipulate both the service and the time during which it is to be done (i.e. the worker receives his wages once he performs his work).
- In case of job wages, one is not obliged to perform the task, but in hiring, the hired person is obliged to perform the service.
- It is not a condition for the validity of giving job wages to specify a certain person to perform the said task. However, in hiring, specifying the worker is a condition for its validity.
- Giving wages is a permissible agreement which each of the two parties can cancel without the permission of the other. Yet, hiring a person's service is a binding agreement that neither of the parties can cancel unless the other agrees.

Faqîhs maintain that whoever performs a task for another without stipulating a wage or taking the employer's permission deserves nothing as wages. This is because he thus performs a task without stipulating compensation, so he deserves nothing in compensation, and he cannot enjoin the employer to do something the latter is not obliged to do. However, there are two exceptions in this case:

First: If a worker, such as a broker, a porter or the like, has prepared himself to do a certain service for a certain reward or wage, when he performs the job, provided he has already taken the employer's permission, he deserves the specified wage, as it is a conventional practice. Yet, he who has not already prepared himself to do the said service deserves nothing as a reward or wage, even if he has been permitted to do it, unless there has been a pervious condition.

Second: If someone rescues another's property from damage or destruction, the former deserves an appropriate wage for this service, even if the owner has not given him permission to do it. This may happen in cases such as rescuing one's property from sinking in the sea, saving it from fire, or protecting it from imminent danger. Such a rescuer deserves an appropriate wage, as he is concerned about others' properties and keen on saving them from damage. Therefore, giving him a wage here urges him, as well as others, to maintain such a good deed, namely rescuing others' properties from damage and destruction.

Shaykhul-Islâm Ibn Taymiyah (may Allah have mercy on him) said:

"Whoever rescues another's property from destruction and returns it safe (to the owner) deserves an appropriate wage, even if there is no previous stipulation, according to the preponderant of the two opinions in this regard, as well as the opinion maintained by Imâm Ahmad and other compilers of Hadith."

Moreover, the great **Imâm Ibnul-Qayyim** (may Allah have mercy on him) said:

"If a person does something in favor of someone's property without the owner's permission to endear himself to the owner of the property, or if he does it to protect the latter's property and to preserve it from damage or loss, it is permissible for him, the rescuer, to ask for a compensatory wage for his service; this is the opinion maintained also by Imâm Ahmad on many occasions."

Endnotes

1 The Two *Sahihs*: The Two Authentic Books of Al-Bukhâri and Muslim.
2 Al-Bukhâri (2276) [4/571] and Muslim (5699) [7/410].

CHAPTER

3

Finding Lost Objects (*Luqaṯah*)

Luqaṯah refers to any lost property, excluding animals, found by someone. Islam, the True Religion, enjoins the protection, safekeeping, and taking care of one's fellow Muslims' properties, even in case of lost-and-found properties.

A lost property is surely one of the following three kinds:

1- An insignificant object: A lost property can be an article that people do not usually care about, such as a whip, a loaf of bread, a fruit, a stick and the like. If someone finds such a lost object, it is permissible for him to take it and make use of it at once without advertising having found it. To illustrate, Jâbir (may Allah be pleased with him) narrated:

> *"The Messenger of Allah (PBUH) gave us permission concerning sticks, ropes, whips, or suchlike things, which a man of us may (accidentally) find, that one may benefit from them."*[1]
>
> (Related by Abû Dâwûd)

2- Animals safe from small predators: The second kind of lost properties is animals that can defend themselves against small wild beasts by means of their big size such as camels, horses, cows, or mules, or by means of flying such as birds, or by means of running fast such as antelopes, or by using their canine teeth such as cheetahs. It is prohibited to pick up such kinds of lost animals and take them on the pretext that they are lost properties; such animals cannot be possessed when found, even if the finder advertises having found them. When the man who found a lost camel asked the Prophet (PBUH) what to do, he (PBUH) replied:

> *"It is none of your concern. It has its feet and its water container (reservoir); it can go on drinking water and eating (leaves of) trees until its owner finds it."*[2]
>
> (Related by Al-Bukhârî and Muslim)

Moreover, 'Umar Ibnul-Khaṯṯâb (may Allah be pleased with him) said:

> *"Whoever takes a lost animal (that he finds) is considered to have gone astray."*[3]

According to the aforementioned *hadith*, the Prophet (PBUH) enjoins Muslims to leave such a lost animal alone to reach water, and eat (the leaves) of trees until its owner finds it. The same ruling applies to big objects and tools such as large pots, wooden articles, iron articles, and all such large things that can hardly be lost or moved from their places. Picking up such large objects and taking them as lost properties is prohibited; it is even more entitled to be prohibited than the aforesaid kind of lost animals.

3- Money, belongings, and animals menaced by small predators: The third kind of lost articles is properties such as money, belongings, and animals that cannot defend themselves against small wild beasts, such as sheep, weaned camels, and calves. It is permissible for the person who is confident of his own trustworthiness to pick up and keep such kinds of lost articles, which fall under three categories:

A) Lawfully edible animals (such as weaned camels, ewes, and hens): If a person finds such a lost animal, he is permitted to use it in one of the following three ways that benefits its original owner most:

1- He can eat it and thus owes its price to its owner.

2- He can sell it and keep its price to give it to its owner when he appears and the finder is certain that he is the real owner.

3- He can keep it, without possessing it, provide it with food and the like at his own expense, and then get back what he has spent from its owner when he appears to reclaim it. When the Prophet (PBUH) was asked about the ruling on finding a lost and ownerless ewe, he (PBUH) replied:

"Take it, for it is either for you, for your brother (i.e. for another fellow who may find it), or for the wolf."

(Related by Al-Bukhârî and Muslim)

This *hadîth* means that the lost, ownerless ewe was weak and liable to perish. So, it would be better to be taken by the man who found it, for if he would not take it someone else would do; otherwise the wolf would eat it. Commenting on this *hadîth*, **Ibnul-Qayyim** said:

"This hadîth implies the permissibility of picking up and taking a lost sheep, and that if the owner of a lost ewe does not come to claim it, it will belong to the one who has found it. Thus, he can eat it and owe its price to its owner, or sell it and keep its price to give to its owner when he appears, or keep it and feed it at his own expense. Scholars unanimously agree that its owner has the right to take it back if he comes before it is eaten by the one who has found it."

B) Perishables: When the found object is liable to become rotten, such as watermelon and fruit, one who finds it should do what best benefits the owner; the finder can eat it and pay its price to the owner, or sell it and keep its price to give to the owner when he meets him.

C) All kinds of properties excluding A and B (such as money and utensils): If one finds such a lost article, one must keep it with him as a trust and advertise having found it. However, no one is permitted to pick up any lost article and keep it unless he is confident of his own trustworthiness, and able to define its description when necessary. To illustrate, Zayd Ibn Khâlid Al-Juhanî (may Allah be pleased with him) narrated:

"A man asked the Prophet (PBUH) about the ruling on finding lost gold or silver (i.e. money) and he (PBUH) replied, 'Remember the description of its container (i.e. the purse or the like) and the string it is tied with, and make public announcement about it for one year. Then, if no one identifies it, you can utilize it but you have to keep it as a trust, and if its owner shows up (to reclaim it) at any time afterwards,

give it to him.' Then, the man asked him about the ruling on finding a lost sheep, he (PBUH) replied, 'Take it, for it is either for you, for your brother (i.e. for another fellow who may find it), or for the wolf.' After that, he (PBUH) was asked about the ruling on finding a lost camel, and he replied, 'It is none of your concern. It has its feet and its water container (reservoir); it can go on drinking water and eating (leaves of) trees until its owner finds it.' "

(Related by Al-Bukhârî and Muslim)

By saying, "*... make public announcement (about it) for one year...*", the Prophet (PBUH) wants the person who picks up such a lost property (gold or silver; money) to announce the description of the lost article wherever people assemble such as marketplaces, in front of mosques, and in meetings and gatherings, for one year. During the first week, such a person is required to make public announcement about the lost article everyday, as it is more likely that its owner will be searching for it to claim it during the first week. After this week is over, the finder is to follow the common convention in his making a public announcement about it. The aforesaid *hadîth* indicates the obligation of making a public announcement about finding a lost article. The Prophet's words, "*Remember the description of its container (i.e. the purse or the like) and the string it is tied with,*" indicate that it is obligatory upon the finder to know the description of the found object. Thus, when its owner comes and describes it correctly, it must be given back to him. However, if a person gives a false description of a lost article, it is impermissible to give it to him. When the Prophet (PBUH) said, "*...Then, if no one identifies it, you can utilize it,*" this implies that after one year, the lost article belongs to the finder, after making the necessary public announcement about having found it. However, the finder should not make use of it unless he knows its description: Its container (or purse), tying material, amount, kind, and such distinctive descriptions. If its owner comes after one year and describes it correctly, it must be given back to him as the Prophet (PBUH) said, "*...and if its owner shows up (to reclaim it) at any time afterwards, give it to him.*" In the light of the above, the rulings on finding lost objects can be summarized as follows:

First: If a person finds a lost object, he is not permitted to pick it up and keep it unless he is confident of his own trustworthiness, and able to announce having found it publicly so as to find its owner.

Accordingly, if one does not trust oneself to take the proper measures for the found object, it is impermissible for one to pick up and keep it; if one does, one is legally considered a usurper for subjecting others' properties to loss.

Second: Before taking a lost article, its finder must know its container, tying material, amount, kind, and such descriptions as enjoined by the Prophet (PBUH) in the aforementioned *hadith*, and the Prophet's commands indicate obligation. The word "container" includes any envelope, purse, bag, piece of cloth, or the like, in which the found object is wrapped and tied.

Third: It is obligatory upon the person who picks up a lost article to make public announcement about it for one year. During the first week, such a person is required to make public announcements about it everyday, and then he is to follow the common convention in his making public announcement about it. He can say in his public announcements something like, "Has anyone lost anything?", or anything of the kind. Such an announcement should be made in places where people assemble, such as marketplaces and in front of mosques after performing congregational prayers. However, it is prohibited to make such an announcement (of finding a lost object) inside the mosque, for mosques are not built for that. The Prophet (PBUH) said:

"If anyone hears a man in the mosque asking about something he has lost, he should say to him, 'May Allah not restore it to you,' for the mosques are not built for that."[1]

Fourth: If the claimant of a lost article describes it correctly, it is obligatory upon the finder to give it to him without asking for any more proof or an oath as enjoined by the Prophet (PBUH). Moreover, a claimant's correct description of a lost article substitutes any further proof or oath. Rather, his correct description is more reliable and credible than a proof or an oath. Also, the finder of a lost article must give back to its owner any direct or indirect profits he obtained through the article. However, if the claimant cannot give the right description of the article, it must not be given to him as it is considered a trust in the custody of the finder. Therefore, it is impermissible for the finder to give the article to someone who cannot prove that he is its owner.

Fifth: if the owner of the lost article does not come to claim it during the one year of the public announcement made by the finder, it becomes the latter's. However, before using the article in any way, the finder must know its description well, so that whenever its owner shows up and identifies it the finder can give it back to him or compensate him for it if it is not there. This is because the ownership of a finder of a lost article is a temporary one which becomes void once the real owner appears and claims it.

Sixth: Scholars differ regarding the ruling on picking up a lost object within Al-Haram (the Sanctuary of Mecca). They differ regarding whether the lost object found there belongs to the finder after making public announcements about it for one year, or whether it does not belong to him at all. Some scholars are of the opinion that the lost object found within Al-Haram takes the same ruling on other lost objects found elsewhere due to the generalization of the *hadiths* in this regard. However, other scholars maintain that it is impermissible to possess a lost article found there, and that it is obligatory to make public announcement about it forever, as the Prophet (PBUH) said about Al-Haram:

"...it is not allowed to pick up its fallen things (i.e. the lost objects found there) except by a person who will look for its owner (by announcing having found it publicly)."[5]

This is also the opinion maintained by **Shaykhul-Islâm Ibn Taymiyah** (may Allah have mercy on him) who said:

"The lost article within Al-Haram can never be owned by the one who picks it up, and it is obligatory to make public announcement about it forever."

This opinion is implied in the aforementioned *hadîth* that prohibits picking up a lost article found within Al-Haram.

Seventh: if someone leaves an animal in a desert due to its inability to walk or his inability to keep it, it will belong to the one who finds and takes it. The Prophet (PBUH) said:

"If anyone finds an animal whose owners could not afford it and so they have released it, and then he (the finder) takes it, it will belong to him."[6]

This is because the owner of such an animal released it out of lack of interest in it, so it has the same rulings on things whose owners get rid of due to lack of interest.

When someone loses his pair of shoes, or any of his belongings, and finds a different one instead in the same place, it is considered a lost article that does not belong to him. Being found in the same place or similar to his lost item does not make it his. Rather, he is obliged to advertise having found it for one year, and then he is permitted to take only what is worth his lost one and then give the rest in charity on behalf of its owner.

Eighth: if a child or a foolish person takes a lost article, his guardian must take it and make a public announcement about having it. This is because a child or a foolish person is not legally qualified to keep trusts. If the guardian leaves the lost article to the child or the foolish person, and it is damaged, he becomes financially liable for it, as he is the one to be blamed for its damage. If the guardian makes a public announcement about the lost article (for one year) and no one identifies it, then it belongs to the child or the foolish person in his custody (as is the case of any grown up or sane person).

Ninth: if a person picks up a lost article from a place and then he places it again in the same place, he becomes legally liable for it, as it becomes a trust in his custody that must be kept like other trusts, whereas leaving it may cause it to be lost. In fact, the Islamic legal rulings concerning lost and found properties show how Islam takes great interest in Muslims' properties and how it is keen on protecting and safeguarding them. This, in general, indicates that Islam urges Muslims to cooperate in righteousness and good. We pray to Allah, Glorified and Exalted be He, to make us firm in Islam and let us die as Muslims.

Endnotes

1 Abû Dâwûd (1717) [2/232].
2 Al-Bukhârî (91) [1/246] and Muslim (4473) [6/247].
3 This was narrated by Sa'îd Ibnul-Musayyab in Al-Bayhaqî (12075) [6/315] and Mâlik (853). Muslim related it in a *marfû'* form of *hadîth* from Zayd Ibn khâlid Al-Juhanî (4485) [6/254].
4 Muslim (1260) [3/56].
5 Al-Bukhârî (2433) [5/108] and Muslim (3289) [5/127].
6 Abû Dâwûd (3524) [3/510].

CHAPTER

4

Foundlings

The rulings on lost babies and those on lost objects are highly related. This indicates the comprehensiveness of Islamic rulings in meeting all the worldly requirements as Islam always pioneers every vital and useful field. The services rendered through the Islamic teachings surpass the contemporary services of nurseries, orphanages, and such places that provide for orphans and disabled children who do not have supporters. Among the unprecedented noble teachings of Islam is its care and interest in foundlings.

A foundling is a baby deserted or abandoned by his parents or who is lost from them, and whose parentage is unknown in both cases. If a Muslim finds a foundling, he/she has to take him, support and provide lodging for him, as it is a collective duty[1] upon the Muslim community; if done by some Muslims there will be no sin upon the rest. Yet, it will be a sin upon the Muslim community if all of them leave foundlings homeless and helpless while they are able to support them. Allah, Exalted be He, says:

"...and cooperate in righteousness and piety..."
(Qur'ân: Al-Mâ'idah: 2)

The generality of the verse indicates the obligation upon Muslims to take lost babies and look after them, as it is considered cooperation in righteousness and piety. To pick up a foundling is a means of saving his life, so it is as obligatory as feeding someone starving or rescuing someone drowning.

A lost child is considered a free human being in all cases, as freedom is the main ruling and slavery is the exception. So, when there is no proof of slavery, the child is considered a free one. On the other hand, whatever money found with the foundling or near him is regarded as his, as it is found in his possession. The finder of the foundling is to use such money in spending on him according to what is acceptable, as he becomes his guardian. However, if the foundling has nothing with him to be used for spending on him, the guardian is permitted to get financial aid from the Muslims' Public Treasury for that purpose. `Umar Ibnul-Khattâb (may Allah be pleased with him), when he was a ruler, said to the finder of a foundling:

"Go. He (the found baby) is free; you have become his guardian, and we are liable for his expenditures."[2]

By saying so, `Umar meant that the finder would take money from the Public Treasury of Muslims to spend on the foundling he picked up. According to another narration, `Umar said to the man, *"...and we are liable for his breastfeeding,"*[3] i.e. the Muslims' Public Treasury would be responsible for the breastfeeding of the foundling baby. Thus, it is not obligatory upon the finder of a lost baby to afford his/her breastfeeding or any other expenditure, but it is an obligation upon the Muslims' Public Treasury instead. Yet, if the Public Treasury of Muslims is unable to afford his/her expenditure, it becomes obligatory upon those Muslims who know about this baby to afford his/her expenditure, for Allah says:

"...and cooperate in righteousness and piety..."
(Qur'ân: Al-Mâ'idah: 2)

In addition, leaving a foundling may lead to his death, but taking him and spending on him is a kind of hospitality like that shown to guests. As regards a foundling's religion, if he is found in an Islamic state or in a non-Islamic state where a lot of Muslims live, he is considered a Muslim, for the Prophet (PBUH) said:

"Every newborn is born with Fitrah (the True Religion of Islam)."[4]

Yet, if the lost child is found in a non-Islamic country where none or few Muslims live, he is considered a disbeliever like the people of his country. In this case, his finder becomes his guardian if he is a trustworthy person. When 'Umar (may Allah be pleased with him) knew that Abû Jamîlah was a righteous man, he approved of him as a guardian of the foundling and said to him, *"You have become his guardian."*[5] Since Abû Jamîlah was the first one to take this lost child, he became more entitled to be his guardian. Concerning any money found with the lost baby, the finder must spend it on this baby according to what is acceptable, as he has become his guardian. A guardian of a Muslim foundling cannot be defiantly disobedient to Allah or a disbeliever, for it is prohibited to make a defiantly disobedient or a disbeliever guardian of any Muslim lest he should persecute him or make him stray from Islam. Likewise, a Bedouin, who moves from place to place, cannot be approved of as a guardian of a lost baby, as he may exhaust him/her. In this case, the baby is to be taken from the Bedouin and be given to one of the residents. This is because staying in an urban area is better for the foundling for both his religious and worldly matters. Besides, it gives him/her a better chance of finding his/her lost family.

When the foundling grows up, and then dies or is killed, his inheritance or his blood money (*diyah*) will belong to the Public Treasury of Muslims, as long as he has no children to inherit from him. Yet, if he has a wife, she gets one fourth of the inheritance. If an heirless foundling is premeditatedly killed, the Imâm of Muslims (the ruler or the one in authority) is legally considered his guardian. This is because an heirless foundling is inherited by all Muslims, whose representative is the Imâm. Accordingly, when a foundling is premeditatedly killed, the Imâm has the right to choose either retaliation or blood money that will be kept in the Public Treasury, as the Imâm of Muslims is deemed a legal guardian of any Muslim who has no guardian. On the other hand, if a foundling is intentionally assaulted and injured, he must be left until he reaches the age of puberty to decide whether to retaliate or pardon the criminal (who assaulted him). If a man or a woman claims the lost child to be his or hers, the child must be returned to him or her, as long as there are no other claimants. This is because it is for the foundling's own good to know his parentage and rejoin his family, and there will be no harm to others in that. However, if different persons claim the lost child to be theirs, he is to be given to whoever produces the proof of his true claim. If no one has a proof, or if they produce contradictory proofs, the decision must be taken by the genealogists. To illustrate, in a similar case, 'Umar Ibnul-Khaṭṭâb[6] resorted to people who judge and distinguish parentage

through resemblance of children and claimants, and that was in the presence of some of the Prophet's Companions (may Allah be pleased with them). Those people were like genealogists nowadays, and the testimony of one of them is sufficient in such cases, as long as he is a male, just person, and experienced in the field.

Endnotes

1 Collective duty: A religious duty which if sufficiently fulfilled by some Muslims, the rest will not be accountable for it as an obligation, and it becomes an act of the Sunnah for them.
2 Al-Bayhaqi (12133) [6/232].
3 Ibn Abû Shaybah (31560) [6/298].
4 Al-Bukhârî (1359) [3/279] and Muslim (6697) [8/423].
5 Related by Mâlik and Al-Bayhaqî as mentioned previously. Its origin was related by Al-Bukhâri (5/337).
6 Al-Bayhaqî (21258) [10/442] and 'Abdur-Razzâq (13475) [7/360].

CHAPTER

5

Endowment (*Waqf*)

In *Shari`ah* (Islamic Law), endowment (*waqf*) refers to the retention of any property that can be benefited from, by suspending disposal of it and dedicating its revenues to public use as an act of charity. Houses, shops, gardens, and the like, can be examples of property endowment, whose benefits (such as fruits, rents, and lodging) can be given in charity. Endowment is desirable in Islam, and it is considered a pious act that brings man near to Allah, as proved through the authentic *Sunnah* (Prophetic Tradition). To illustrate, it is stated in the Two Sahihs that `Umar (may Allah be pleased with him) said to the Prophet (PBUH):

> *"O Messenger of Allah! I have a land in Khaybar which I prize highly, so what do you order me to do with it?" The Prophet said, "If you like, you can give the land as endowment and give its fruits in charity." Thereupon, `Umar gave it in charity (as an endowment*

on the condition) that the land and trees will neither be sold nor given as a present, nor bequeathed. He endowed it for the poor, for his kith and kin, for emancipation of slaves, for the Cause of Allah, for travelers and for guests[1].

Imâm Muslim also related in his Sahih (Authentic Book of Hadith) that the Prophet (PBUH) said:

"*When a human being dies, his deeds come to an end except for three deeds (whose rewards are everlasting): ongoing charity, knowledge benefited from (by others), or a pious son who prays for him.*"[2]

Jâbir (may Allah be pleased with him) said:

"*All the rich of the Prophet's Companions gave endowments.*"

Al-Qurtubî (may Allah have mercy on him) said:

"*There is no disagreement among the faqihs on the permissibility of endowing barrages and mosques. Yet, they differ about other properties.*"

The donor of an endowment must be legally qualified to manage his own property. This means that s/he must be a free, adult, and sane person. Thus, a child, a foolish or weak-minded person, or a slave is not legally qualified to grant an endowment.

An Endowment is Established through Either of the Following Two Ways

1. **Verbal indication of endowment**, such as saying, "I endow this place," or saying, "I endow this place to be used as a mosque."
2. **Actions that indicate endowment** according to common convention, such as turning one's house into a mosque and giving permission for people to perform prayer therein, or turning one's land into a cemetery and permitting people to bury dead persons therein.

A Verbal Statement of an Endowment Is of Two Kinds

1. **Direct statement:** such as saying, "I endowed such and such property," or saying, "I grant such and such property as an endowment in the

Cause of Allah", and the like. These are direct statements that have only the meaning of granting endowments. When a donor just utters such words, his endowment becomes valid (if it meets the necessary conditions), and he does not need to say any other formulas to confirm the endowment.

2. **Metonymy:** here it means saying metonymic words that can have meanings other than endowment, such as saying, "I give such and such property in charity," "I grant such and such property to be used forever," or the like. When a donor uses such metonymic words, he must have the intention of granting an endowment, or use some direct statements side by side with such metonymic words to clarify them.

Conditions for the Validity of Establishing an Endowment

1- The donor must be legally qualified to manage his own property, as mentioned above.

2- The endowed object must be an identified article which is constantly utilizable and non-consumable, unlike food and the like.

3- The endowed object must be specified. It is invalid to grant unspecified endowments; it is invalid, for example, to say, "I endow one of my slaves," or saying, "I endow one of my houses," without specifying it.

4- The endowment must be for something beneficial, for it is a means of getting nearer to Allah, such as mosques, barrages, measuring bowls, houses, books of useful knowledge, etc. Another example of endowments for righteous use is endowing something to support kith and kin. Accordingly, an endowment is invalid to be made for temples of the disbelievers, for books of disbelief and atheism, or for lighting or incensing shrines or providing food and water for the custodians of certain graves. This is because such endowments are regarded as means of assisting others in disobedience, polytheism, and disbelief.

5- If the endowment is made for a certain person, that person must be one whose ownership is legally considered valid, because an endowment is a kind of ownership that is not valid for those who cannot possess properties, such as a dead or an animal.

6- An endowment must be fulfilled once it is made; it is invalid to be temporary or suspended except in case it is a condition for it to be given on the donor's death. For example, it is valid for a donor of an endowment to say, "When I die, my house will be an endowment for the poor." To illustrate, Abû Dâwûd related that 'Umar Ibnul-Khattâb (may Allah be pleased with him) determined in his will that after his death, land of his called Thamgh would be an endowment for charity[3]. Since this tradition was well known and no scholar disapproved of it, it is considered consensus. Thus, if an endowment is made conditional on the donor's death, it must be given from only one third of his property, as endowments take the same ruling on bequests.

It is obligatory to fulfill the condition of the donor of the endowment as long as it does not violate *Shari'ah*, for the Prophet (PBUH) said:

> *"Muslims must keep to the conditions they make, except for a condition that makes something prohibited lawful or something lawful prohibited."*[4]

Besides, 'Umar Ibnul-Khattâb (may Allah be pleased with him) made a condition when he granted an endowment, and if it were not obligatory to be fulfilled, it would be of no use to make it. Therefore, the donor of an endowment can make conditions concerning the amount of the endowment, the priority order of the beneficiaries, the presence or the lack of certain quality (or qualities) of the beneficiaries, the guardianship of the endowment, and so on. That is to say, the condition made by the donor must be fulfilled unless it violates the Qur'ân or the *Sunnah* (Prophetic Tradition). However, if the donor stipulates nothing, those to whom the endowment is donated will be equal; there will be no difference between the rich and the poor or between the males and the females among them.

If no guardian is stipulated by the donor to take care of the endowment, or if the appointed guardian dies, the endowment must be supervised by those to whom the endowment is donated if they are specified persons. If the endowment is granted to an association like a mosque, or for unspecified people or unlimited number of people such as the needy or the poor in general, the authorities are responsible to take care of the endowment or, at least, to appoint someone to do so.

Generally, the guardian of an endowment must fear Allah and take good care of the endowment, for it is considered a trust in his liability.

If the donor makes an endowment for his children, male and female children will be equal, as he has made them equal partners in his endowment. Since there is no specific division stipulated by the donor, all his children will have equal share in it, just like the case when one grants something to his children; it is equally divided among them. After the death of the donor's children, the endowment is to be given to the children of his sons, not those of his daughters. This is because daughters' children belong to other men (their fathers) whose names are given to them, and thus those children are not included in the Qur'anic verse that states:

> ***"Allah instructs you concerning your children [i.e. their portions of inheritance]..."*** (Qur'ân: An-Nisâ': 11)

However, some scholars maintain that ***"your children"*** in the aforesaid verse also include daughters' children, as one's daughters are one's children, and their children are the children of one's children. And, Allah knows best.

If the donor says, "I make this endowment for my sons, or for the sons of so and so, then the endowment will belong only to the sons, not the daughters, for the word "sons" refers to the male children not to the female ones. Allah, Exalted be He, shows such distinction when He says:

> ***"Or has He daughters while you have sons?"***
>
> (Qur'ân: At-Tûr: 39)

However, if the donor specifies that he makes the endowment for a certain tribe, such as Banû Hâshim (i.e. sons of the tribe of Hâshim) or Banû Tamîm (i.e. sons of the tribe of Tamîm), the endowment will belong to both the sons and the daughters of the specified tribe. This is because the title "Banû" of an Arab tribe refers to both the sons and daughters of the tribe, though "Banû" means sons.

If the donor makes an endowment for a limited group of people whose members can be specified, each of them must have an equal share, but if it is for a group whose members cannot be specified or limited, it is not obligatory to divide it among them, as it will be impossible then. Rather, it is permissible to make the endowment restricted to some of them, according to a priority order.

An endowment is one of the binding commitments that become obligatory to fulfill once they are made. Hence, it is impermissible to cancel it, for the Prophet (PBUH) said:

> *"...the land and trees (of an endowment) will neither be sold nor given as a present, nor bequeathed."*[5]

At-Tirmidhî said, *"Scholars rely on this hadîth (for the ruling on endowment)."* In short, it is impermissible to cancel an endowment, as it is legally considered an eternal contract. Moreover, an endowment can neither be sold nor transferred from its place unless its benefits completely vanish. For example, when the endowed house collapses and the profit it makes cannot afford its repair, or when the endowed agricultural land becomes infertile and its yield cannot afford its reclamation, it is permissible in such cases to sell the endowed object and use its price to get its like, for this best serves the objective of its granter. However, if the value of the sold endowed property cannot afford an equal substitute, the price is to be spent to get a similar one even if of less value. Thus, the new property will be regarded as an endowment once it is bought.

If the endowed property is a mosque that is no longer in use as it is damaged or the like, it is to be sold and its price must be spent on getting another mosque. If the profit of an endowment is dedicated to a mosque, and the profit is more than enough, it is permissible to spend the surplus money on another mosque, for this serves and complies with the main purpose of the endowment. Similarly, it is permissible to give charity to the needy from the surplus profit of an endowment originally allocated to a mosque.

If the donor designates a particular person as the endowment beneficiary, and specifies a certain amount of money of the endowment profit to be granted to that person every year, the surplus money is to be specified. **Sheikh Taqiyyud-Dîn** (may Allah have mercy on him) said in this regard:

> *"If the proceeds of the endowment are always more than enough, the surplus must be charitably spent, for keeping it decreases its value."*

If the donor makes an endowment for the benefit of a mosque, and then this mosque is ruined and the endowment yield cannot afford its repair, it must be spent on another mosque.

Endnotes

1 Al-Bukhârî (2737) [5/435] and Muslim (4200) [6/88].
2 Muslim (4199) [6/87]; Abû Dâwûd (2880) [3/201]; At-Tirmidhî (1380) [3/660] and An-Nasâ'î (3653) [3/561]
3 Abû Dâwûd (2879) [3/201].
4 Abû Dâwûd (3594) [4/16] and At-Tirmidhî (1352) [3/634].
5 Al-Bukhârî (2764) [5/479].

CHAPTER

6

Gift and Donation

The gift refers to a donation of a specific amount of property given by a person legally qualified to manage his own property. The Prophet (PBUH) used to give and accept gifts. Thus, giving or accepting a gift is a recommended act of the *Sunnah* (Prophetic Tradition) due to its consequent virtues. The Prophet (PBUH) said:

> *"Give presents to one another to gain the love of one another."*[1]

`Â'ishah (may Allah be pleased with her) said:

> *"The Messenger of Allah (PBUH) used to accept gifts and give something in return."*[2]

The Prophet (PBUH) said:

> *"Give presents to one another, for a present removes rancor."*[3]

The gift belongs to the recipient once he gets it with the permission of the giver, after which the latter is prohibited to take it back. However, if the gift

is not yet given to the recipient, it is permissible for the giver to take it back due to the following *hadîth* narrated by `Â'ishah (may Allah be pleased with her). She narrated that Abû Bakr As-Siddîq, her father, granted her an amount of twenty *wasqs*[4] of the dates of some palm trees in Al-`Âliyah (a place near Medina) a year. Then when Abû Bakr fell ill, he said to her:

> *"O my daughter, I granted you some palm trees in Al-`Âliyah which would produce twenty wasqs of dates a year. If you renewed and possessed them, they would belong to you. Yet, they are considered now a property of all my heirs. So, divide them according to the Book of Allah, Exalted be He."*[5]

If one is granted a gift that is already a trust with him or borrowed money in his liability, it becomes his without having to give it back and retake it from the giver. Also, it is permissible for the creditor to give up the debt as a gift to the debtor, and thus there will be no liability on the part of the debtor to pay back such a debt. In addition, it is permissible to give as a gift whatever can be legally sold.

It is invalid to make the gift dependent on a future condition, as when the giver says to the recipient, "If such and such happens, this gift will be yours." An exception of this ruling is when the giver stipulates that the gift is to be given to the recipient after the giver dies, as when he says to the recipient, "When I die, such and such is yours." In this case, the gift will be regarded as a bequest and will entail the latter's rulings.

On the other hand, it is invalid to give a temporary gift, as when the giver says, "I will give you such and such as a gift only for a month (or a year)." This is because a gift is a kind of property possession, just like a sold article, so it cannot be temporarily granted.

It is impermissible for a father to give a gift to one or some of his children without giving similar gifts to the others, as it is obligatory for him to be just and to treat all of them as equals, giving them equal gifts. An-Nu`mân Ibn Bashîr narrated that once his father gave him a gift and accompanied him to the Prophet (PBUH) in order to make him a witness to this gift. The Prophet (PBUH) asked him:

> *"Have you given equivalent ones to everyone of your children?" When the man answered in the negative, the Prophet (PBUH) said to him, 'Take it back,' and added, 'Fear Allah, and be just to your children.' "*[6]
>
> (Related by Al-Bukhârî and Muslim)

This *hadith* states that it is obligatory for parents to treat their children justly and equally and to give them equal gifts. It also indicates that it is prohibited for a Muslim to be a witness to such a gift or help to carry it out, as long as he knows its injustice.

When the recipient takes the gift, the giver is prohibited to take it back, due to the following *hadith* narrated by Ibn `Abbâs: the Prophet (PBUH) said:

> *"He who takes back a gift (which he has already given) is like a dog that vomits, and then swallows its vomit."*[7]

This *hadith* indicates the prohibition of taking back the gift, except for a gift granted by a father to his child, as stated in the following *hadith*: the Prophet (PBUH) said:

> *"It is not lawful to anyone to give a gift then take it back except for the parent who takes back what he has given to his child."*[8]
>
> (Related by the Five Compilers of *Hadith*, and deemed *sahih* (authentic) by At-Tirmidhî)

As long as he does not harm his child or deprive him of his needs, the father is permitted to take from the property of his child, due to the *hadith* narrated by `Â'ishah stating that the Prophet (PBUH) said:

> *"The pleasantest things you enjoy come from what you earn, and your children come from what you earn as well."*[9]
>
> (Related by At-Tirmidhî and other compilers of *Hadith*, and he deemed it *hasan* (good) *hadith*)

There are some similar *hadiths* indicating the permissibility for the father to take, possess, and eat from the property of his child, provided that the father does not harm his child or affect his needs. Moreover, by saying to a man, *"You and your property belong to your father,"*[10] the Prophet (PBUH) obligates the child to serve his father. This makes it permissible for the father to take from the property of his child whenever he needs. Still, it is impermissible for the father to take and possess from the property of his child in a way that harms the latter or deprives him of his needs, as the Prophet (PBUH) said:

> *"One should not harm others nor should one seek benefit for oneself by causing harm to others."*[11]

It is impermissible for the son to claim a debt from his father. Once, a man accompanied his father to the Prophet (PBUH) to claim a debt from him (the father), and the Prophet (PBUH) said to the son:

"You and your property belong to your father."

This *hadīth* states that it is impermissible for the son to claim a debt from his father. In addition, Allah, Exalted be He, says:

"...and to parents do good..." (Qur'ân: Al-Baqarah: 83)

Thus, Allah, Glorified be He, ordains Muslims to do good to parents, so a Muslim child should never claim a debt from his parents. Yet, if the child is unable to earn his living and his father can afford his expenditures, he is permitted to claim the remittance he deserves from his father in order to safeguard his life. To illustrate, the Prophet said to Hind Bint `Utbah:

"Take what is sufficient for you and your children, and the amount should be just and reasonable."[12] [13]

In fact, giving gifts to one another removes rancor and malice from people's hearts and begets love and concord among them; the Prophet (PBUH) says:

"Give presents to one another, for a present removes rancor from the heart."[14]

On the other hand, a gift should not be rejected even if it is very humble or little. It is an act of the *Sunnah* to give something in return for the gift as the Prophet (PBUH) used to accept gifts and give something in return, which reflects the glorious Islamic values and noble character.

Endnotes

1 Imâm Mâlik's Collection Book of *Hadīths* entitled *'Al-Muwatta'* (16) [2/326]; Al-Bukhârî's book entitled *'Al- 'Adabul-Mufrad'* (594) and Al-Bayhaqî (11946) [6/280].

2 Al-Bukhârî (2585) [5/259].

3 Ahmad (9222) [2/405] and At-Tirmidhî (2135) [4/441].

4 *Wasq*: A standard measure that equals 130320 grams.

5 Al-Bayhaqî (11948) [6/280].

6 Al-Bukhârî (2587) [5/260] and Muslim (4157) [6/69].

7 Al-Bukhârî (2589) [5/266] and Muslim (2152) [6/67].

8 Abû Dâwûd (3539) [3/518]; An-Nasâ'î (3692) [3/576] and Ibn Mâjah (2377) [3/126]. At-Tirmidhî mentioned it without mentioning its chain of transmission (3/592).

9 Abû Dâwûd (3528) [3/513]; At-Tirmidhî (1362) [3/639]; An-Nasâ'î (4461) [4/276] and Ibn Mâjah (2290) [3/80]. Abû Dâwûd (3530) [3/514] and Ibn Mâjah (2292) [3/80].

10 Abû Dâwûd (3530) [3/514] and Ibn Mâjah (2292) [3/80].

11 Ahmad (2867) [1/313] and Ibn Mâjah (2340) [3/106], and (2341).

12 That was the Prophet's reply when Hind Bint 'Utbah complained to him that her husband, Abû Sufyân, was a miser who did not give her what was sufficient to meet her and her children's needs, asking the Prophet if it was permissible for her to take some of his property without his knowledge.

13 Al-Bukhârî (5364) [9/628] and Muslim (4452) [6/234].

14 Ahmad (9222) [2/405] and At-Tirmidhî (2135) [4/441].

V:INHERITANCE

CHAPTER

1

Disposal of One's Property during Sickness

The validity of one's disposal of one's own property while being in a sound health differs from that in sickness, as long as one disposes of his property according to the *Sharî`ah* (Islamic Law) and reason, and as long as this disposition is not open to question. It is worth mentioning that giving charity in sound health is much better and more rewardable than giving charity while being in sickness.

Allah, Exalted be He, says:

> ***"And spend [in the way of Allah] from what We have provided you before death approaches one of you and he says, 'My Lord, if only You would delay me for a brief term so I would give charity and be among the righteous.' But never will Allah delay a soul when its time has come. And Allah is Acquainted with what you do."***
>
> (Qur'ân: Al-Munâfiqûn: 10 - 11)

It is related in the Two *Sahihs*[1] that when the Prophet (PBUH) was asked about the kind of charity that has the greatest reward, He (PBUH) answered:

> *"(The greatest charity is that which) you give in charity when you are healthy and niggardly hoping to be wealthy and afraid of becoming poor. Do not delay giving in charity until the time when it (i.e. the soul at death) reaches the throat and you say, 'Give so much to so and so and so much to so and so,' and at that time the property is not yours but it belongs to so and so (i.e. your inheritors)."*[2]

There are Two Types of Diseases

First: Curable diseases: These are diseases which do not normally lead to death, such as toothache, eye pain or non-acute headache. In such cases, similar to a healthy person, a sick person's disposal of his own property is valid. Thus, one's disposition of all one's property (such as gifts, endowments and donations etc.) in this case is valid, even if one's illness changes into an incurable disease and leads to death.

Second: Incurable diseases: This is the illness which usually results in death. In such cases, a sick person's donations and gifts are valid up to only one-third of his money and not from his fixed capital. If his dispositions of his property exceed one-third, then they are invalid, unless approved by his heirs after his death. The Prophet (PBUH) said:

"Allah made a charity upon you at death by (allowing you to give) one-third of your wealth (as a charity) to increase your (good) deeds."[3]

(Related by Ibn Mâjah and Ad-Dâraqutnî)

The aforementioned *hadith* and those with similar meanings indicate that a sick person's disposal of his money upon his death should not exceed one-third of his wealth. This is the opinion adopted by the majority of scholars. This is because a person suffering from an incurable disease is likely to die and any disposition of his fixed capital will harm his inheritors; therefore, his gifts are limited to one-third only, the same as the will.

Similar to incurable diseases are dangerous circumstances, such as being in a country where there is an epidemic, in the battlefield, or while traveling on rough seas in a storm. In such cases, disposing of more than one-third of the entire property is invalid unless approved by the inheritors after his death. Likewise, if a person in such conditions

donates to a legal heir (who is entitled to a prescribed share) under any of such circumstances, then his disposition is invalid unless approved by his inheritors. This is in case he dies in these circumstances. Yet, if a person recovers from such a serious disease, then all his gifts are considered valid, due to the absence of the impedimentary cause.

The rulings on a healthy person are the same as those pertaining to the person having a chronic disease, but not confining him to bed. The donations given by such a person from all of his money (not only one-third) is valid. That is because this chronic disease does not normally lead to death, so it is the same as the case of old age. Nevertheless, if this chronic disease forces a person to stay in bed, then his case is the same as the one afflicted with an incurable illness. Thus, he cannot bequeath more than one-third of his property and he is not to bequeath to anyone of the legal heirs except when the heirs approve of that. That is because, a bedridden person is likely to die.

One-third of the deceased person's property should be taken into consideration at the time of his death, since it is the time at which ownership of a bequest is transferred from the testator (or his heirs) to the legatee. Thus, at this time bequests and donations are to be fulfilled from one-third of the property. However, if his entire property is not enough to cover his bequests and donations, then donations take precedence over bequests in being applied since they are effective before his death (while bequests are effective after), as if they are made while he is in sound health.

Faqihs[1] (may Allah have mercy on them) state that bequests are different from current dispositions (such as gifts, endowments and donations, etc.) in four things:

Firstly: There is no difference between the firstly mentioned legatees and those mentioned later in the bequest, because all of the bequeathed property is to be disposed of after the testator's death, all at once. On the contrary, current dispositions are implemented one after another according to their order.

Secondly: One cannot cancel one's current dispositions after they have already been given while one has the right to nullify the bequest or revoke it at any time since it is applicable only after one's death.

Thirdly: Current dispositions are effective before the death of the donor while bequests are effective after. In other words, current dispositions are normally implemented whenever they exist. As for a bequest, it is a transfer of ownership which comes into operation after the testator's death; therefore, it is not effective before his death.

Fourthly: The transfer of ownership of current dispositions is at the time of accepting them, even before the death of the donor. Conversely, the time at which ownership of a bequest is transferred from the testator to the legatee is the death of the testator, since it is a transfer of ownership which comes into operation after the testator's death, so it must not be taken before its due time.

Endnotes

1 The Two *Sahihs*: The Two Authentic Books of Al-Bukhârî and Muslim.
2 Al-Bukhârî (2748) and Muslim (1032).
3 Ibn Mâjah (2709) [3/308], Al-Bayhaqi (12571) [6/441] and Ad-Dâraqutnî (4245) [4/85].
4 *Faqih*: A scholar of Islamic Jurisprudence.

CHAPTER

2

Wills

A will, according to *faqihs*' definition, is a legal declaration of how a person wishes his possessions to be disposed of after his death. In other words, it is an action in which one donates one's property to be given after one's death.

The will is legislated according to the Qur'ân, the *Sunnah* (Prophetic Tradition) and consensus. Allah, Exalted be He, says:

> ***"Prescribed for you when death approaches [any] one of you if he leaves wealth [is that he should make] a bequest for the parents and near relatives according to what is acceptable – a duty upon the righteous."*** (Qur'ân: Al-Baqarah: 180)

And He also says:

> ***"...After any bequest he [may have] made or debt..."***
> (Qur'ân: An-Nisâ': 11)

Moreover, the Prophet (PBUH) said:

> *"Allah made a charity upon you at death by (allowing you to give) one-third of your wealth (as a charity) to increase your (good) deeds."*[1]

In addition, there is a unanimous agreement among Muslim scholars on the permissibility of the will.

The will is obligatory to be made in some cases and is desirable in others. It is obligatory for a person to determine by a will all financial rights of others which he is holding, or his financial rights which others are holding. This is to be done in case these rights are not recorded, lest they should be lost. The Prophet (PBUH) said:

> *"It is not permissible for any Muslim who has something to will to stay for two nights without having his last will and testament written and kept ready with him."*[2]

Thus, if someone has deposits or rights which he owes to some people, he must clearly list and record them in his legacy.

It is desirable for a person to bequeath a portion of his property to charity, the reward of which will be recorded for him after death. The Lawgiver[3] permitted one to give one-third of one's wealth (as a charity) to increase one's good deeds.

Similar to prayer, a will is valid from a sane boy. A will is legally valid if there are witnesses to an oral declaration, or if it is written in the known handwriting of the testator.

Among the rulings on a will are the following:

- The testator is permissible to bequeath up to a maximum of one-third of his property. Some scholars deem it desirable to bequeath less than one-third of the property, as reported about Abû Bakr As-Siddîq, 'Alî Ibn Abû Tâlib, and 'Abdullâh Ibn 'Abbâs (may Allah be pleased with them all). Abû Bakr As-Siddîq (may Allah be pleased with him) said:

  "I bequeathed the amount which Allah has determined for Himself."[4]

  The amount indicated in this phrase is that mentioned in the Qur'anic verse:

  "And know that anything you obtain of war booty – then indeed, for Allah is one fifth of it..." (Qur'ân: Al-Anfâl: 41)

Moreover, `Ali Ibn Abû Tâlib (may Allah be pleased with him) said:

"Indeed, to bequeath one-fifth (of the property) is preferred for me to bequeath a quarter."[5]

Ibn `Abbâs (may Allah be pleased with him) said:

"It would be better for people to lower the value of the bequest from one-third to a quarter (of the property), for the Prophet (PBUH) said, '...One-third; yet, even one-third is too much.' "[6]

- It is impermissible for a testator to bequeath more than one-third of his estate if he has legal heirs, unless approved by them, since it is their right. However, if they authorize this excess, then his bequest is considered valid. Moreover, their authorization is to be valued after the testator's death.
- It is legally invalid to bequeath an extra portion to a legal heir, for the Prophet (PBUH) said:

  "No bequest must be made to an heir."[7]

  (Related by Ahmad, Abû Dâwûd and At-Tirmidhî, and the latter deemed it *hasan*)

  There are other narrations similar to this *hadith* but with slight change in wording. **Sheikh Taqiyyud-Dîn** said:

  "There is a uniform agreement on this hadith. Imâm Ash-Shâfi`î stated that the aforementioned hadith is a mutawâtir (continuously recurrent) hadith,[8] *and he said, 'There is unanimous agreement among the scholars specialized in issuing legal rulings and the scholars of military expeditions of the Prophet (PBUH) from Quraysh and others that the Prophet (PBUH) said this hadith in the year of the Conquest of Mecca. Moreover, they report this hadith on the authority of those they met from among the people of knowledge.'*[9] *Thus, any bequest made in favor of any legal heir already entitled to a prescribed share is invalid unless approved by other legal heirs, since it is their right. Consequently, a testator may bequeath an extra portion to a legal heir or dispose of a portion exceeding one-third to a non-legal heir if other legal heirs consent to the bequest, providing their permission is made while the testator is on the deathbed or after his death."*

- A bequest is desirable from a wealthy person whose heir is well-off, for Allah, Exalted be He, says:

  "Prescribed for you when death approaches [any] one of you if he leaves wealth [is that he should make] a bequest..."

  (Qur'ân: Al-Baqarah: 180)

  The word 'wealth' in the aforesaid verse implies that the testator should be rich in order to make a bequest. Furthermore, a bequest is not desirable from the poor person who has little money and whose heirs are in need of his money. By doing so, he will be abandoning his relatives, who are in need of his money, for the benefit of strangers. The Prophet (PBUH) said to Sa`d Ibn Abû Waqqâs:

  "You would better leave your inheritors wealthy rather than leaving them poor, begging others."[10]

  **Imâm Ash-Sha`bî** said, *"No money has a greater reward than the money left by a man to his children to suffice them from begging others."*[11] `Alî Ibn Abû Tâlib said to a man,

  "You have left only little property, so let it go to your heirs."[12]

  Moreover, many of the Prophet's Companions did not make bequests.

- It is prohibited for a testator to make a bequest with the intention of harming and annoying his inheritors, for, by doing this, he will be committing a sin. Allah, Exalted be He, said:

  "...as long as there is no detriment [caused]..."

  (Qur'ân: An-Nisâ': 12)

  A similar meaning is implied in the following *hadith* in which the Prophet (PBUH) says:

  "It could happen that a man spends sixty years in obedience to Allah and when he is on his deathbed, he may cause harm (to his heirs) in his will, so the Hellfire becomes inevitable to him."[13]

  Ibn `Abbâs (may Allah be pleased with him) said:

  "Causing harm by the will is one of the major sins."[14]

  Imâm Ash-Shawkânî (may Allah have mercy on him) said,

  *"The Qur'anic verse '**...as long as there is no detriment [caused]...**'* (Qur'ân: An-Nisâ': 12) *means that a testator can make a bequest if only it will not cause any kind of harm to his inheritors such as stating owing*

*something he, in fact, does not owe to anyone, making a bequest with no intention but harming his inheritors, bequeathing an extra portion to an heir, or bequeathing more than one-third to a non-legal heir while not approved by the other inheritors. This condition, i.e. '...**as long as there is no detriment [caused]**...' is applied to bequests and debts which are mentioned in the aforesaid noble verse. In other words, any assignments of debts or bequests, which are forbidden or made with no intention other than harming the inheritors, are considered invalid and rejected and nothing of them is to be fulfilled, either one-third or less."*

- One may bequeath his entire property if he has no inheritors, for the Prophet (PBUH) said:

  "You would better leave your inheritors wealthy rather than leaving them poor, begging others."[15]

  The permissibility of bequeathing the entire property, providing there are no legal heirs, is stated in a *hadith* reported about Ibn Mas`ûd (may Allah be pleased with him)[16]. Also, the majority of Muslim scholars are of the same view, because the prohibition of bequeathing more than one-third is only for the sake of the inheritors; thus, if there are no inheritors, then there will be no reason for prohibition. Moreover, bequeathing the entire property will not harm any one since there are no heirs or creditors, and it is as if the testator had devoted all his money in charity during his life. In this regard, **Imâm Ibnul-Qayyim** said:

  "The soundest opinion is that the testator has the right to bequeath his entire property, providing he has no heirs. That is because the Lawgiver has forbidden bequeathing more than one-third only if there are legal inheritors, so the one who has no inheritors can do whatever he wants with his money."[17]

- If one-third of the testator's current money does not cover the amount of the money assigned in his bequest, and the heirs have refused to authorize the excess over one-third, then the amount of the portions of all the legatees is to be decreased, each one by virtue of his allotted share. There is no difference between the legatees mentioned first and those mentioned later in the bequest because all of the bequeathed property is to be disposed of after the testator's death; therefore, the bequeathed property has become due at the same time. Thus, the excess is to be deducted from the legatees' portions at the same time, since they (the legatees) equally share the property but may differ in

the amount deducted from each one's share, just as the case with the *'awl*[18]. Similar to this is the case wherein a testator bequeaths a hundred riyals for a person, a hundred riyals for a second person, fifty riyals for a third person, thirty riyals for a fourth person, and twenty riyals for a fifth person, thereby the total amount he has bequeathed is three hundred riyals. Yet, one-third of his entire property is only hundred riyals. Thus, each person is to be given only one-third of the portion he was allocated in the bequest.

- The validity or the invalidity of the bequest, with regard to legatees, is considered at the time of the death of the testator. For example, if a person bequeaths to a legal heir and at the time of death of the testator this heir becomes an illegal heir, such as the case of a brother who has been excluded (of being an heir) by a testator's newborn son. In this case, the bequest is considered valid at the time of death of the testator because it is the time at which ownership of a bequest is transferred from the testator to his heirs and legatees. On the contrary, if a testator makes a bequest for an illegal heir and at the time of death of the testator this illegal heir becomes a legal heir, the bequest will not be valid. An example for that is the case of a testator who bequeaths to his brother while the testator's son is still alive at the time of the bequest and this son dies after that. Thus, the bequest is considered invalid unless authorized by the other heirs because the testator's brother has become a legal heir at the time of the testator's death. Consequently, the acceptance of a bequest by the legatee is only relevant after the death of the testator and not before, and also the transfer of ownership of a bequest from the testator or his heirs to the legatee is only after the death of the testator, and it is not permissible for the legatee to accept the bequest before the death of the testator. **Al-Muwaffaq** said:

  "There is no difference of opinion amongst scholars that the validity of the bequest is considered at the time of the testator's death. If the bequest is to non-specific individuals, such as the poor, the family of so and so, or for a public interest such as building mosques, then it is effective immediately after the testator's death, and the acceptance of the bequest by the legatee is irrelevant in such cases. But if the bequest is made in favor of a particular individual, then the ownership of the article bequeathed depends on the acceptance of the legatee after the testator's death."

- The testator has the right to revoke his will by a subsequent will, or nullify it, completely or partially. To illustrate, 'Umar (may Allah be pleased with him) said:

  "One has the right to change whatever one likes in one's bequest."[19]

  There is also an agreement amongst people of knowledge with regard to this matter. If a testator makes some article a bequest but then he says, *"I changed my mind,"* or says any word which implies that he is nullifying his bequest or part of it, then his bequest is nullified. That is because the time of the death of the testator is the only relevant time, with regard to the validity of the bequest and the acceptance or the rejection of the bequests by the legatee. Thus, the testator has the right to revoke his will during his lifetime. For example, if a testator says, "If X comes, I bequeath to him what I have bequeathed to Z," and X has come during the testator's lifetime, then the bequest is to X, and in such case the testator's bequest to Z is nullified. However, if X comes after the testator's death, then the bequest is to Z. That is because the testator's death has been before the arrival of X; thus, the bequest has (been) settled and transferred to Z.

- Obligatory expenses such as debts and religious obligations like *Zakâh*, expiations, vows and *Hajj*, must be paid first, whether mentioned in the will or not, as Allah, Exalted be He, says:

  '...after any bequest which was made or debt...'

  (Qur'ân: An-Nisâ': 11)

  'Alî Ibn Abû Tâlib (may Allah be pleased with him) said:

  "The Messenger of Allah (PBUH) decreed that one's debt is to be settled before one's will is carried out."[20]

  (Related by At-Tirmidhî, Ahmad and other compilers of *Hadîth*) According to the aforementioned, paying debts comes before fulfilling the will. It is recorded in *Sahîh Al-Bukhârî (Al-Bukhârî's Authentic Book of Hadîth)*:

  "...So fulfill Allah's Rights, as He is more entitled to receive His rights."[21]

  Thus, according to the consensus, the sequence of rights is as follows: debts are to be settled, the bequest is to be fulfilled, and then the remaining property is to be divided between the legal heirs. It should be noted that the bequest is mentioned before debts in the aforemen-

tioned noble verse despite of the fact that debts take precedence over bequests when fulfilling them. This is because, similar to inheritance, fulfilling a bequest is granting property with no compensation, so the inheritor carries it out with great difficulty. Thus, bequest is mentioned in the above verse before debts in order to urge inheritors to carry it out, and to emphasize its importance. It is noteworthy that the conjunction '**or**', which indicates equality, is used in the verse, ***"...after any bequest which was made or debt..."*** in order to stress that both things are equally important, although debts take precedence over bequests when fulfilling them. Accordingly, the will is of a fundamental importance. Allah, Exalted be He, mentions it in the Noble Qur'ân and gives it precedence over other matters, thus stressing its importance and encouraging people to fulfill it, as long as it complies with the Islamic rulings. Moreover, Allah, Exalted be He, warns whoever neglects the will or changes it without any legal excuse. He, Exalted be He, says:

"Then whoever alters it [i.e. the bequest] after he has heard it – the sin is only upon those who have altered it. Indeed, Allah is Hearing and Knowing." (Qur'ân: Al-Baqarah: 181)

Imâm As-Shawkânî, in his exegeses of the Qur'ân stated:

"Altering means changing. It is a threat from Allah to whoever alters a legally valid will which does not harm any one. The sin of altering the will shall befall those responsible for altering it and there will be no sin upon the testator, for he has absolved himself by making a bequest."

- A bequest is permissible to be made in favor of any one capable of possessing such bequest, whether a believer or a disbeliever. This is due to Allah's statement:

"...except that you may do to your close associates a kindness [through bequest]..." (Qur'ân: Al-Ahzâb: 6)

Muhammad Ibnul-Hanafiyyah said, *"This verse refers to the bequest of a Muslim to a Jew or a Christian."* Moreover, 'Umar Ibnul-Khattâb (may Allah be pleased with him) gave his polytheist brother a garment striped with silk,[22] and Asmâ' gave a gift to her mother though the latter was a disbeliever,[23] and Sâfiyyah, Mother of the Believers, bequeathed one-third of her property to her Jewish brother[24]. Allah, Exalted be He, says:

"Allah does not forbid you from those who do not fight you because of religion and do not expel you from your homes – from being righteous toward them and acting justly toward them. Indeed, Allah loves those who act justly."

(Qur'ân: Al-Mumtahinah: 8)

- Bequeathing to a particular non-Muslim individual is valid, as previously mentioned; however, it is impermissible to bequeath to disbelievers in general. For example, if one bequeaths to Jews or Christians, in general, or their poor people, then his bequest is considered invalid. Similarly, it is impermissible to bequeath anything which must not be owned by a non-Muslim to a particular disbeliever, such as the Noble Qur'ân, a Muslim slave, or arms.

- Bequeathing to a person yet unborn is permissible, provided that the child is either born alive within six months of the time the bequest is made, if the mother has a husband, or is born alive within a period less than four years after the bequest is made if the mother is husbandless. Such fetus legally inherits; thereupon, bequeathing to it is permissible with greater reason. However, if the child is born dead, the bequest becomes invalid. Nevertheless, a bequest to an unborn child, who has not existed at the time during which the bequest is made, is invalid. For example, if one says, "I bequeath such and such a thing to the child whom this woman will be pregnant with," then his bequest is invalid since he is bequeathing to a nonexistent person.

- If the testator bequeaths a great amount of money for performing *Hajj* on his behalf, then the bequeathed money should be fully paid for doing as many times as can be until the money is exhausted. But if the bequeathed money is little, then it must be paid in doing pilgrimage on behalf of the deceased according to its amount. However, if the testator stipulates that the big amount of money he has bequeathed is to be spent in one *Hajj* on his behalf, then it must be spent in one *Hajj*, for he has intended by doing this the benefit of the one performing *Hajj* on his behalf. In such cases, it is not permissible for the executor or an inheritor to perform *Hajj* on behalf of the deceased, because the testator apparently specified another one to perform *Hajj* on his behalf.

- Bequeathing to anyone who is not capable of possessing the bequest is invalid such as bequeathing to a jinni, an animal or a dead person.

- Needless to say, nothing in the will should be contrary to *Sharī'ah* (Islamic Law), such as bequeathing to churches or temples of disbelievers and polytheists. Similarly, it is impermissible to bequeath to keeping or lighting graves or to the gatekeepers of these graves, whether the testator is a Muslim or a disbeliever. **Shaykhul-Islâm Ibn Taymiyah** said:

  "If a Jewish or a Christian bequeaths a portion of his property to their temples, then Muslims must invalidate this bequest, because they must judge by what Allah has revealed, and Allah has revealed that Muslims must not co-operate in aid of disbelief, defiance or disobedience to Allah. Thus, Muslims must not fulfill a bequest to places wherein people disbelieve in Allah."[25]

  Similarly, it is impermissible to bequeath to publishing abrogated books such as the Torah and the Gospel, or publishing perverted books such as books of atheism.

- It is a necessary condition for the validity of a bequest to be of legal money or of utilizing something permissible even if the item bequeathed is something undeliverable, such as, a flying bird, an embryo, the milk in the udder of a milch animal, or something not yet existent. For example, someone may bequeath the fruits of a tree forever or for a certain period, one year, for example, or he may bequeath what a certain animal may deliver. In such a case, the bequest is for the legatee only when such inexistent thing materializes. However, if such inexistent thing does not materialize, then the bequest is considered invalid, for in such case there is no bequeathed item in fact.

- Among things that may be bequeathed is something or someone unknown such as bequeathing an unknown animal. In such a case, the legatee is given anything by that means, in reality or according to custom.

- If the testator bequeaths one-third of his estate, and after making his bequest he gets more money, then this extra money must be included in his bequest. This is because, the one-third is considered from the entire property owned by the testator at the time of his death.

- If the bequeathed property is damaged before or after the death of the testator, then the bequest is considered invalid, and the legatee's right is terminated, due to the damage caused to the bequeathed item.

- If the testator does not define the amount of the bequeathed item such as bequeathing a share from his money, then this share is to be set as one-sixth. This is because, in the Arabic language, a share indicates

one-sixth. This is the opinion of `Alî Ibn Abû Tâlib, and `Abdullâh Ibn Mas`ûd in this regard. In addition, one-sixth is the least prescribed share; therefore, it is referred to in indicating the undefined bequeathed share. If a testator bequeaths some of his property to a legatee, and he has not specified the amount of the bequeathed property, then the inheritor is to give the legatee any amount of money, since the word "some", linguistically and legally, does not imply any specific amount. So, the word "some" can refer to anything that is considered property, and whatever is not considered a property does not fulfill the bequest.

Rulings Related to the Executor

- The executor is the person who is appointed by the testator to dispose of the estate after the testator dies. That is to say, the executor is in charge of all that the testator has been in charge of during his life. So, the bequest executor is the testator's deputy.
- Accepting this deputyship (i.e. to be the executor) is desirable, and is considered an act of worship by which one attains nearness to Allah. Yet, this deputyship is permissible only for the one who has the capacity and the honesty to undertake the bequest. Allah, Exalted be He, says:

  "...And cooperate in righteousness and piety..."

  (Qur'ân: Al-Mâ'idah: 2)

  The Messenger of Allah (PBUH) said:

  "...Allah helps a person so long as the person helps his (Muslim) brother."[26]

  Also, the Prophet's Companions used to assign deputies to dispose of their properties after their death. To illustrate, a group of the Prophet's Companions appointed Az-Zubayr Ibnul-`Awwâm to be their executor,[27] Abû `Ubaydah Ibnul-Jarrâh appointed `Umar Ibnul-Khattâb as the executor of his will,[28] and `Umar Ibnul-Khattâb appointed his daughter Hafsah[29] (may Allah be pleased with her) as his executor, and also assigned the eldest of his sons to take over her position successively after her. As for the one who has not the capacity to properly undertake the bequest or feels that he might waste it, then it is impermissible for him to accept this responsibility.

- The executor of the bequest must be a Muslim, as it is impermissible to appoint a non-Muslim to be an executor of a will. Moreover, the executor must be legally accountable, for it is not valid to appoint a little boy, an insane or a foolish (or weak-minded) person as executors of wills, because they are not capable of undertaking guardianship responsibilities. Yet, one may appoint a boy to be the executor when that boy reaches legal majority, as the Prophet (PBUH) said concerning the Battle of Mu'tah, when he appointed Zayd as the commander of the Muslim army:

  "If Zayd is martyred, Ja`far is to take over his position."[30]

- Appointing a female executor is considered valid, provided that she has the ability to undertake the bequest responsibilities. That is because `Umar Ibnul Khattâb appointed his daughter Hafsah as the executor of his will. Moreover, a woman can be a legal witness; hence, she can be appointed as an executor of a will.

- It is also valid to appoint an executor who cannot practice the work by himself, provided that he is of sound reasoning, and can appoint another honest one to help him. In addition, it is valid to appoint more than one executor, whether they are appointed by the testator at the same time or one after another. If the testator appoints more than one executor, then they should manage the bequest collectively. Each executor should not act independently of the other executor(s), i.e. their acts proceed from the decision of the group. If one of them dies or is absent, then those in authority are to appoint another one instead, who must be capable of undertaking the responsibility.

- Appointing an executor of the bequest is considered valid if the executor accepts this responsibility while the testator is still alive or after his death. Moreover, both the bequest executor and the testator have the right to cancel this appointment whenever they wish i.e. before or after the testator's death. This is because the executor is just a deputy.

- It is impermissible for the bequest executor to appoint another executor unless the testator authorizes the executor to appoint whomever he chooses as executor of the bequest. The items in the will must be known and defined so the executor of the will can uphold and dispose of these items.

- The testator must have the legal authority to dispose of whatever he bequeaths in his will, such as paying a debt, distributing the bequeathed third, looking after the welfare of his children, and so forth. Consequently, the bequest executor undertakes the bequest according to permission from the testator. Thus, as in the case of deputyship, the bequest executor cannot dispose of anything which the testator does not have the legal authority to dispose of. Moreover, the testator is the original owner and the bequest executor is his deputy; consequently, the deputy does not own what the original owner does not actually possess. In brief, it is invalid for the testator to bequeath what he does not really own, such as the case wherein a woman testator appoints someone as the guardian of her children, this appointment is considered invalid since guardianship is only for the father.

- The authority of the executor of the will is limited to what the testator has specified i.e. if the executor is appointed by the testator to pay his debts, then he does not have the legal right to act as the guardian of the children. Thus, like the deputy, the executor's duty as an executor of the will is limited to what the testator has authorized him to do.

- It is valid for the bequest executor to be a Muslim if the testator is a non-Muslim, provided that the testator's estate does not include anything legally prohibited. So, if the testator's estate includes what is forbidden such as liquor or swine, then this appointment (the appointment of a Muslim executor) is invalid. That is because it is impermissible for a Muslim to be in charge of such prohibited things.

- If the testator says to the executor, for example, "I authorize you to distribute the bequeathed third (of my property) as you wish," or "I authorize you to spend the bequeathed third in charity among whomever you choose," then it is impermissible for the executor to take anything of this money for himself, because the testator has not permitted this. Moreover, it is not permissible for the executor to give his children or his heirs anything from this money, because in this case he is more likely to be biased toward them.

If someone dies in a place where there is no governor or guardian, such as someone dies in a desert, then it is permissible for one of those who are present to manage his estate, and do what is appropriate such as selling his estate and the like. That is because it is a state of necessity, for if his estate is left, it will be spoiled, and protecting that person's estate is a collective duty. It is worth mentioning that funeral expenses, in such a case, are to be paid from the estate of the deceased.

Endnotes

1 Ibn Mâjah (2709) [3/308], Al-Bayhaqi (12571) [6/441] and Ad-Dâraqutnî (4245) [4/85].
2 Al-Bukhârî (2738) [5/436] and Muslim (4180) [6/77].
3 The Lawgiver of *Shari'ah* (Islamic Law) is Allah, Exalted be He; the term can also refer to the Prophet (PBUH) as he never ordained but what was revealed to him by Allah.
4 `Abdur-Razzâq (16363) [9/66]. A similar *hadith* was narrated by Qatâdah; Al-Bayhaqî (12574) [6/442] and Ibn Abû Shaybah (30909) [6/228].
5 `Abdur-Razzâq (16361) [9/66] and Al-Bayhaqî (12576) [6/442].
6 Al-Bukhârî (2743) [5/452] and Muslim (4194) [6/85].
7 Abû Dâwûd (3565) [3/527]; At-Tirmidhî (2125) [3/433] and Ibn Mâjah (2714) [3/311].
8 *Mutawâtir* (continuously recurrent) *hadith* is a *hadith* reported by a large number of narrators whose agreement upon telling a lie is inconceivable (this condition must be met in the entire chain from the beginning to the end).
9 See: the footnote in *'Ar-Rawd Al-Murbi'*'
10 Al-Bukhârî (1295) [3/210] and Muslim (4185) [6/79].
11 See: the footnote in *'Ar-Rawd Al-Murbi'*'
12 Ad-Dârimi (3072) [2/862]; Ibn Abû Shaybah (30937) [6/230] and `Abdur-Razzâq (16352) [9/63].
13 Abû Dâwûd (2867) [3/195]; At-Tirmidhî (2122) [4/431] and Ibn Mâjah (2704) [3/305].
14 Ad-Dâraqutni (4249) [4/86]. And Al-Bayhaqî (12587) [6/444]. Al-Bayhaqî reported it in a *marfû'* form of *hadith* (12586); `Abdur-Razzâq (16456) [9/88]; Ibn Abû Shaybah (30927) [6/229] and Ad-Dâraqutnî (4249) [4/86].
15 Al-Bukhârî (1295) [3/210] and Muslim (4185) [6/79].
16 `Abdur-Razzâq (16371) [9/68].
17 See: the footnote in *'Ar-Rawd Al-Murbi'*'
18 *'Awl*: An increase in the number of shares and a decrease in their amounts according to the deserving parties.
19 Ad-Dâraqutnî in his book of *Sunan* [6/460]; Ad-Dârimi (3094) [2/867] and Ibn Abû Shaybah (30795) [6/217].
20 Ahmad (595) [1/80]; At-Tirmidhî (2127) [4/435] and Ibn Mâjah (2715) [3/311].
21 Al-Bukhârî (6699) [11/711].
22 Al-Bukhârî (886) [2/480].
23 Al-Bukhârî (2660) [5/286] and Muslim (2321) [4/90].
24 Abû Dâwûd (3180) [2/885], Al-Bayhaqî (12650) [6/459], Abdur-Razzâq (19344) [10/353] and Ibn Abû Shaybah (30754) [6/213].
25 See: the footnote in *'Ar-Rawd Al-Murbi'*'
26 Muslim (2699).
27 Ibn Abû Shaybah (30899) [6/227].
28 Ibn Abû Shaybah (4261) [7/639].
29 Ad-Dârimî (3179) [2/844], Ad-Dâraqutnî (4379) [3/177]; see also Ibn Abû Shaybah (30761) [6/214].
30 Al-Bukhârî (4261) [7/639].

CHAPTER

3

Inheritance: Rulings

The issue of inheritance is of a fundamental importance. The Prophet (PBUH) encouraged Muslims to learn the rules of inheritance and teach them to others, as he (PBUH) said:

> *"Learn the rules of inheritance and teach them to others for they are half of knowledge and they are liable to be forgotten. Besides, they are the first (branch of knowledge) to be taken away from my nation."*[1]
>
> (Related by Ibn Mâjah)

In another version, he (PBUH) said:

> *"I am a mortal and knowledge will be taken away and trials will appear until (there would be) two persons who would differ about a case of inheritance and cannot find anyone to give a judgment concerning it."*[2]
>
> (Related by At-Tirmidhî and Al-Hâkim)

Needless to say, what the Prophet (PBUH) said has happened; this branch of *Sharî`ah* (Islamic Law) has been ignored and forgotten; it is rarely taught in mosques or in Muslims' schools except through very insufficient studies in some educational institutions, which neither give the sufficient knowledge nor guarantee its survival.

Thus, Muslims should set to renew this branch of *Sharî`ah* (Islamic Law), and preserve it in mosques, schools and universities, for they are in dire need of this knowledge, and also they will be held responsible for it. Moreover, it is stated that the Prophet (PBUH) said:

> *"(Religious) knowledge has three categories; anything else is extra; a precise verse, or an established Sunnah (Prophetic Tradition), or a firm rule of inheritance."*[3]

`Umar Ibnul-Khattâb (may Allah be pleased with him) said:

> *"Learn the rules of inheritance, for they are part of your religion."*[4]

Also, `Abdullâh Ibn Mas`ûd (may Allah be pleased with him) said:

> *"Whoever reads the (Noble) Qur'ân should learn the rules of inheritance."*[5]

The rules of inheritance have probably been referred to as "half of knowledge" in the *hadîth* reported from the Prophet (PBUH), because they include most of the Islamic rulings that have to do with human beings in the state of death, and the other remaining rulings are concerned with human life. It is also said that the rules of inheritance are so called (i.e. "half of knowledge") because all human beings are in need of them. Actually, there are many reasons for referring to the rules of inheritance that way, the important of which is that it encourages one to study the rules of inheritance.

The laws of inheritance refer to the shares allotted to legal heirs by the Noble Qur'ân. In other words, they are the prescribed shares of the estate which are to be given to those who deserve them. The laws of inheritance deal with the correct distribution of the wealth of a deceased person. The study of rules of inheritance is the study of estate division, their juristic rulings, and the calculations for distributing shares.

When a Muslim dies, five rights are deducted from his estate. The first thing taken from his property is the expenses of preparing his body for being buried such as the cost of the shroud, washing his body and the washer's fee, preparing his grave, and so forth. Then, the rights he owes are to be paid,

whether they are rights of Allah, Exalted be He, (such as *Zakâh*, expiations, vows or obligatory *Hajj*), or debts to people. After these expenses are deducted, his bequest must be fulfilled, provided that it does not exceed one-third of his estate, as previously mentioned. After that, the remaining property is divided between his legal heirs, according to the laws of inheritance. Finally, the rest of the property, if there is any, is for agnate relatives,[6] as will be explained later.

Changing the laws of inheritance, which are decreed by Allah, is impermissible and is considered an act of disbelief, for Allah, Exalted be He, says:

> ***"These are the limits [set by] Allah, and whoever obeys Allah and His Messenger will be admitted by Him to gardens [in Paradise] under which rivers flow, abiding eternally therein; and that is the great attainment. And whoever disobeys Allah and His Messenger and transgresses His limits – He will put him into the Fire to abide eternally therein, and he will have a humiliating punishment."*** (Qur'ân: An-Nisâ': 13-14)

With regard to these verses, **Imâm Ash-Shawkâni** (may Allah have mercy on him) stated in his exegesis of the Qur'ân:

> *"The word '**these**', in the aforementioned verse, refers to the laws of inheritance which are discussed in the two verses preceding these two verses mentioned above. Allah, Exalted be He, refers to these laws as '**limits**' because it is impermissible to exceed the limits of these rules or violate them. The phrase '**...and whoever obeys Allah and His Messenger...**' means: whoever obeys Allah and His Messenger in applying the laws of estate division or any other Islamic rulings, as implied by the general meaning of the phrase '**...will be admitted by Him to gardens [in Paradise] under which rivers flow...**' "*

After that, **Imâm Ash-Shawkâni** added:

> *"It is also related by Ibn Mâjah on the authority of Anas that the Messenger of Allah (PBUH) said, 'If anyone disinherits his heir, Allah will deprive him from his share in Paradise on the Day of Resurrection.' "*[7] [8]

Thus, whoever changes any of the laws of inheritance and perverts them (such as allowing an illegal heir to inherit, disinheriting a legal heir or depriving him of part of his share) will be cast into the Fire forever. Also, if anyone, for example, makes males and females equal when dividing an estate (as applied in some non-Muslim legal systems), he thus contradicts Allah's Law, as He,

Exalted be He, has revealed in His Book that a male is to inherit a portion equal to that of two females. Such a person is deemed a disbeliever and will be cast into the Fire to abide eternally therein unless he repents to Allah before he dies.

People of the Pre-Islamic Period of Ignorance (*Al-Jâhiliyyah*) used to disinherit women and children; only adult males, who can ride horses and hold weapons, were entitled to inherit. Then, the Islamic religion came to invalidate this system, and Allah, Exalted be He, said:

> ***"For men is a share of what the parents and close relatives leave, and for women is a share of what the parents and close relatives leave, be it little or much – an obligatory share."***
>
> (Qur'ân: An-Nisâ': 7)

This verse abolishes the system that used to be applied before Islam when women and children used to be disinherited. The following two verses also abolish the contemporary systems that treat males and females on an equal footing, with regard to the shares of inheritance. This is considered an act of opposing Allah, Exalted be He, and His Messenger (PBUH) and transgressing His limits, as Allah says:

> ***"Allah instructs you concerning your children [i.e. their portions of inheritance]: for the male, what is equal to the share of the two females..."*** (Qur'ân: An-Nisâ': 11)

And He also says:

> ***"...If there are both brothers and sisters, the male will have the share of two females..."*** (Qur'ân: An-Nisâ': 176)

The Pre-Islamic Period of Ignorance (*Al-Jâhiliyyah*) deprived women totally from all their rights in inheritance, whereas, ironically enough, contemporary ignorance has given her what she legally does not deserve. On the contrary, Islam honors woman and treats her with justice, giving her all her legal rights. So, may Allah fight those disbelievers, hypocrites and atheists, whom Allah, the Almighty, has described saying:

> ***"They want to extinguish the light of Allah with their mouths, but Allah refuses except to perfect His light, although the disbelievers dislike it."*** (Qur'ân: At-Tawbah: 32)

Endnotes

1 Ibn Mâjah (2719) [3/315].
2 At-Tirmidhî (2096) [4/413] and Al-Hâkim (8020, 8021) [4/333]
3 Abû Dâwûd (2885) [3/207] and Ibn Mâjah (54) [1/41].
4 Ad-Dârimî (2744) [2/779] and Ibn Abû Shaybah (31025) [6/241].
5 Ad-Dârimî (2751) [2/800].
6 Agnate relatives are those related on or descended from the father's or male side.
7 Ibn Mâjah (2703) [3/304] and Ibn Abû Shaybah (31032) [6/242].
8 See: *'Fathul-Qadir'* [1/700].

CHAPTER

4

Causes of Inheritance and the Legal Inheritors

Inheritance is the transfer of the legal possession of a deceased person to his heirs, according to the laws of inheritance ordained by Allah.

There are three causes of inheritance:

1. **Blood Relationship:** Blood relation refers to the relation between two persons by birth rather than by marriage, no matter how far or near the relationship is, as long as nothing or none blocks them from receiving their prescribed shares. Allah, Exalted be He, says:

   "...But those of [blood] relationship are more entitled [to inheritance] in the decree of Allah." (Qur'ân: Al-Anfâl: 75)

   Blood relationships include the forefathers, the offspring and the collateral relatives. The paternal forefathers include the father, the

paternal grandfather and so forth in ascending lineage, who are linked through males to a common ancestor. The offspring include the son, the grandson by the son and so forth in descending lineage. The collateral relatives include the brothers and their children, no matter how far down they descend, as well as paternal uncles, sons of paternal uncles (cousins), and so forth in a descending lineage[1].

2. **Marriage:** The marriage must be according to a correct (valid) contract of marriage, even if there is no consummation and the two spouses have not yet met in privacy. This is due to the statement of Allah, Exalted be He:

   "And for you is half of what your wives leave if they have no child. But if they have a child, for you is one fourth of what they leave, after any bequest they [may have] made or debt. And for them [i.e. the wives] is one fourth..." (Qur'ân: An-Nisâ': 12)

   The two spouses inherit from each other according to the aforesaid verse, and also in the case if a revocable divorce is pronounced as long as the woman is still in the waiting period, for, during the waiting period, the woman is still a legal wife. The phrase "the correct contract of marriage" excludes the incorrect contracts of marriage, for the right of inheritance arises from only a valid contract of marriage, and the incorrect marriage does not affect the rulings on inheritance.

3. **The *walâ'* (the freed slave's loyalty by virtue of emancipation):** It is a relationship between the master and the manumitted slave, in which the former inherits any property the latter may acquire due to the former's favor done to the latter. The inheritance is from only one side, i.e. if the manumitted slave dies, the emancipator inherits from him, and not vice versa. If the emancipator dies, then his universal heirs by oneself, and not co-universal heirs, inherit from this manumitted slave. To illustrate, the Prophet (PBUH) says,

   "The walâ' is a bond like that of kinship."[2]

   (Related by Ibn Hibbân in his *Authentic Book* of *Hadith*, and also related and deemed sahih (authentic) by Al-Hâkim)

   Thus, he (PBUH) made the *walâ'* similar to blood relationships. Therefore, the *walâ'* is a cause for inheritance like blood relationships, according to the consensus of Muslim scholars. Moreover, it is related in the Two Sahîhs[3] that the Prophet (PBUH) said:
   "Verily, the walâ' is for the emancipator."

Inheritors According to Gender

Inheritors are divided into male and female heirs. **Male heirs are ten:**

- **The son, the son of the son,** and so froth in a descending male lineage, for Allah, Exalted be He, says:

  "Allah instructs you concerning your children [i.e. their portions of inheritance]: for the male, what is equal to the share of the two females..." (Qur'ān: An-Nisā': 11)

  The grandson is the same as the son; this is due to Allah's statement:

  "O children of Adam..." (Qur'ān: Al-A'rāf: 26)

  And also Allah, Exalted be He, says:

  "O Children of Israel..." (Qur'ān: Al-Baqarah: 40)

- **The father, the paternal grandfather,** and any forefathers of the paternal grandfather. This is because Allah, Exalted be He, says:

  "...And for one's parents, to each one of them is a sixth of his estate..." (Qur'ān: An-Nisā': 11)

  Moreover, the paternal grandfather is the same as the father, for the Prophet (PBUH) judges that he inherits one-sixth of the estate, the same as the father[1].

- **The brother**, whether he is a full or half brother. This is because Allah, Exalted be He, says:

  "They request from you a [legal] ruling. Say, 'Allah gives you a ruling concerning one having neither descendants nor ascendants [as heirs].' If a man dies, leaving no child but [only] a sister, she will have half of what he left. And he inherits from her if she [dies and] has no child..." (Qur'ān: An-Nisā': 176)

  This verse refers to brothers who have different mothers. As for those who have the same mother, but have different fathers, Allah, Exalted be He, says:

  "...And if a man or woman leaves neither ascendants nor descendants but has a brother or a sister, then for each one of them is a sixth..." (Qur'ān: An-Nisā': 12)

- **The son of a full brother or the son of a half brother from the same father**; as for the son of the brother who has the same mother of the deceased, but a different father, he does not inherit because he is one of the blood relatives.
- **The father's full brother (paternal uncle) and the father's half brother from the same father and the son of the aforesaid paternal uncle (cousin)** and so forth in descending lineage. However, the father's half brother from different fathers does not inherit from the deceased. To illustrate, the Prophet (PBUH) said:

  "Give the shares of the inheritance (prescribed in the Qur'ân) to those who are entitled to receive them. Then whatever remains should be given to the closest male relative of the deceased."[5]

- **The husband,** for Allah, Exalted be He, says:

  "And for you is half of what your wives leave..."

  (Qur'ân: An-Nisâ': 12)

- **The emancipator** who has the right of the *walâ'* or his heirs,[6] for the Prophet (PBUH) said:

  "The walâ' (i.e. loyalty by virtue of emancipation) is a bond like that of kinship."[7]

  He (PBUH) said also:

  "Verily, the walâ' is for the emancipator."[8]

Female Inheritors are Seven:

- **The daughter, the daughter of the son (granddaughter)** and any female grandchildren descending from male lineage. To illustrate, Allah, Exalted be He, says:

  "Allah instructs you concerning your children [i.e. their portions of inheritance]: for the male, what is equal to the share of the two females. But if there are [only] daughters, two or more, for them is two thirds of one's estate. And if there is only one, for her is half..." (Qur'ân: An-Nisâ': 11)

- **The mother and the grandmother**, for Allah, Exalted be He, says:

  "...But if he had no children and the parents [alone] inherit from him, then for his mother is one third. And if he had brothers [and/or sisters], for his mother is a sixth..." (Qur'ân: An-Nisâ': 11)

Buraydah (may Allah be pleased with him) narrated a *marfû'* (traceable) *hadith* stating that the Prophet (PBUH) said:

"The grandmother (of the deceased) is to be given sixth (of the inheritance) if the mother is not alive."

(Related by Abû Dâwûd)

- **The sister**, whether a full sister or a half sister for Allah, Exalted be He, says:

  "...And if a man or woman leaves neither ascendants nor descendants but has a brother or a sister, then for each one of them is a sixth..." (Qur'ân: An-Nisâ': 12)

  Allah also says:

  "...If a man dies, leaving no child but [only] a sister, she will have half of what he left. And he inherits from her if she [dies and] has no child. But if there are two sisters [or more], they will have two thirds of what he left..." (Qur'ân: An-Nisâ': 176)

- **The wife** (i.e. the widow), for Allah, Exalted be He, says:

  "...And for them [i.e. the wives] is one fourth..."

  (Qur'ân: An-Nisâ': 12)

- **The female emancipator** (inherits from the slave she has freed due to the right of the *walâ'*) as the Prophet (PBUH) said:

  "Verily, the walâ' is for the emancipator."

  The aforesaid list generally covers the number of possible male and female inheritors, but in detail, they are fifteen male inheritors and ten female inheritors. One may check the references of *Sharî'ah* (Islamic Law) for more details in this regard; and Allah, Exalted be He, knows best.

Types of Inheritors According to Their Shares of Inheritance

Inheritors according to their shares of inheritance are of three categories:

- Those entitled to specified prescribed shares that do not increase unless through the *radd*[10] nor decrease unless through the *'awl* (reduction of the heirs' shares).
- Agnate relatives: Those whose shares of inheritance are not defined
- Blood relatives: They are to inherit when there is none entitled to prescribed shares – except for the spouses – and when there are no agnate heirs.

Those entitled to prescribed shares are ten: spouses, parents, paternal grandfather, daughters, daughters of the son, sisters (whether full sisters or half sisters), and brothers and sisters who have the same mother. Each one of those entitled to prescribed shares will be explained in detail.

Endnotes

1 See: the footnote in *'Arwd Al-Murbi'*
2 Al-Hâkim (8071) [4/490], Ibn Hibban (4950) [11/325], Al-Bayhaqî (21433) [10/494]; see also Al-Bukhârî (2535) [5/206] and Muslim (3767) [5/387].
3 The Two *Sahihs*: The Two Authentic Books of Al-Bukhârî and Muslim.
4 Abû Dâwûd (2897) [3/214] and Ibn Mâjah (2723) [3/318].
5 Al-Bukhârî (6732) [12/14] and Muslim (4117) [6/54].
6 This means that if the manumitted slave dies, the emancipator or his inheritors are to inherit the manumitted salve due to the right of the *walâ'* (the freed slave's loyalty by virtue of emancipation).
7 Al-Hâkim (8071) [4/490], Ibn Hibban (4950) [11/325], Al-Bayhaqî (21433) [10/494]; see also Al-Bukhârî (2535) [5/206] and Muslim (3767) [5/387].
8 Al-Bukhârî (2535) [5/206] and Muslim (3767) [5/387].
9 Abû Dâwûd (2895) [3/2014].
10 The *radd*: It is the distribution of the remaining portion of estate among the prescribed heirs. To illustrate, if something remains of the estate after the prescribed heirs take their shares, and there is no agnate heir to take over the remaining portion, this portion is to be redistributed among the prescribed heirs, each according to his share.

CHAPTER

5

Inheritance of Spouses

The husband inherits one-half the estate if the deceased wife does not have a child (male or female; even if from another husband), or a grandchild by her son. However, the husband inherits one-fourth if the deceased wife has a child, or a grandchild by her son. To illustrate, Allah, Exalted be He, says:

> ***"And for you is half of what your wives leave if they have no child. But if they have a child, for you is one fourth of what they leave, after any bequest they [may have] made or debt..."***
>
> (Qur'ân: An-Nisâ': 12)

The wife (or the wives together) inherits one-fourth the estate if the deceased husband does not have a child (male or female; even if from another wife), or a grandchild by his son. She (or the wives together) inherits one-eighth if the deceased husband has a child or a grandchild by his son. To illustrate, Allah, Exalted be He, says:

"...And for them [i.e. the wives] is one fourth if you leave no child. But if you leave a child, then for them is an eighth of what you leave, after any bequest you [may have] made or debt."

(Qur'ân: An-Nisâ': 12)

CHAPTER

6

Inheritance of Fathers and Paternal Grandfathers

The father of the deceased or the paternal grandfather (in case the father is dead) is entitled to inherit one-sixth of the estate as a prescribed share if the deceased has a son or a grandson by his son. This is because Allah, Exalted be He, says:

> *"...And for one's parents, to each one of them is a sixth of his estate if he left children..."* (Qur'ān: An-Nisā': 11)

The father of the deceased (or the paternal grandfather in case the father is dead) inherits only by virtue of agnation if the deceased has no child, or a grandchild by his son. This is according to the noble verse that states:

> *"...But if he had no children and the parents [alone] inherit from him, then for his mother is one third..."* (Qur'ān: An-Nisā': 11)

In this verse, Allah, Exalted be He, entitles the inheritance to both parents; the mother inherits one-third of the estate whereas the share of the father is not defined. Therefore, the father gets whatever remains of the estate by virtue of agnation.

The father (or the paternal grandfather in case the father is dead) inherits by virtue of **both** prescribed share and agnation if the deceased has a daughter, or a granddaughter by his son. The Prophet (PBUH) says:

> *"Give the shares of the inheritance (prescribed in the Qur'ân) to those who are entitled to receive them. Then whatever remains should be given to the closest male relative of the deceased."*[1]

That is to say, the rest of the inheritance goes to the closest male relative of the deceased namely the father, who is considered the closest male after the son and the grandson.

To sum up, the father has three cases:

- **The first**: The father inherits only by virtue of prescribed share if the deceased has a son, or a grandson by his son, and so forth in a descending lineage.
- **The second**: The father inherits only by virtue of agnation in case the deceased has no son, or a grandson by his son, and so forth in a descending lineage.
- **The third**: The father inherits by virtue of **both** prescribed share and agnation in case the deceased has a daughter, or a daughter of his son.

The paternal grandfather is the same as the father in the above three cases as mentioned in the Qur'ân and the *Sunnah* (Prophetic Tradition) in case the father is dead. However, the paternal grandfather has an additional fourth case, namely if the deceased has full brothers, or half brothers from the father's side. Scholars have two different opinions in this regard.

The first opinion is that paternal grandfather of the deceased equally shares the estate with the deceased's brothers without preventing them from receiving their share, and then they all equally share the remaining estate by virtue of agnation according to certain known rules in this regard. This opinion is based on the fact that the paternal grandfather and the brothers of the deceased are equally agnate relatives of the deceased's father, who is already dead; the deceased's paternal grandfather is his father, and the deceased's brothers are his

sons. Therefore, the deceased's paternal grandfather and the deceased's brothers share together the estate and the paternal grandfather is to be treated as any one of them regarding inheritance. This is the opinion of a group of the Prophet's Companions such as `Alî Ibn Abû Tâlib, Ibn Mas`ûd, Zayd Ibn Thâbit, and it is also the opinion of Imâm Mâlik, Imâm Ash-Shâfi`î, the two Disciples of Imâm Abû Hanîfah,[2] and the well-known opinion reported to have been maintained by Imâm Ahmad in this regard. They reached this opinion on the basis of many evidences, *ijtihâd*,[3] and analogical deductions, which are mentioned in the elaborative main volumes on inheritance.

The second opinion is that the existence of the paternal grandfather prevents the deceased's brothers from inheritance just as the existence of the father does. This is the opinion of Abû Bakr As-Siddîq, Ibn `Abbâs, and Ibn Az-Zubayr. It is also reported to have been adopted by `Uthmân Ibn `Affân, `Â'ishah, Ubayy Ibn Ka`b, Jâbir Ibn `Abdullâh and others. It is also the opinion maintained by Imâm Abû Hanîfah, and it is one of the opinions reported to have been adopted by Imâm Ahmad. Moreover, this opinion is the one maintained by Shaykhul-Islâm Ibn Taymiyah, Ibnul-Qayyim, and Sheikh Muhammad Ibn `Abdul-Wahhâb (may Allah have mercy on them all). They have based their opinion on many proofs, and this is the preponderant one compared to the first, and Allah knows best.

Endnotes

1 Al-Bukhârî (6732) [12/14] and Muslim (4117) [6/54].

2 The two disciples of Abû Hanîfah meant here are his two prominent followers; Abû Yûsuf and Muhammad Ibnul-Hasan Ash-Shaybânî.

3 *Ijtihâd* (legal reasoning and discretion): An independent judgment in legal question, based on the interpretation and application of the Four Foundations: the Qur'ân, the Prophet's *Sunnah*, Consensus of scholars and Analogy.

CHAPTER

7

Inheritance of Mothers

The mother of the deceased has three cases regarding inheritance:

The first case: The mother inherits one-sixth of the estate if the deceased has an inheriting descendant, such as a child (male or female) or a grandchild by the son, or in case the deceased has two or more siblings, whether males or females. This is because Allah, Exalted be He, says:

"... And for one's parents, to each one of them is a sixth of his estate if he left children..."

Then Allah says in the same verse:

"... And if he had brothers [and/or sisters], for his mother is a sixth..." (Qur'ân: An-Nisâ': 11)

The second case: The mother inherits one-third of the estate if the deceased has neither a descendant heir, such as a child or a grandchild

by his son, nor does he have two or more siblings, whether males or females. This is because Almighty Allah says:

"...But if he had no children and the parents [alone] inherit from him, then for his mother is one third..."

(Qur'ân: An-Nisâ': 11)

The third case: The mother inherits one-third of the remainder of the estate, not of the estate itself, in any of the following two cases:

- If the deceased is a female and she has left a husband, a father and a mother
- If the deceased is a male and he has left a wife, a father, and a mother

These two cases are known as the *'Umariyyatân*[1] because 'Umar Ibnul-Khattâb has judged that the mother is to inherit one-third of the remainder of the estate after the deceased's spouse receives his/her share of the estate[2]. Commenting on these two cases, **Shaykhul-Islâm Ibn Taymiyah** (may Allah have mercy on him) said:

"The opinion judged by 'Umar is the soundest opinion, because Allah, Exalted be He, entitles the mother to inherit one-third of the estate if the two parents will inherit the deceased son or daughter; Allah says, ***'...But if he had no children and the parents [alone] inherit from him, then for his mother is one third...'*** (Qur'ân: An-Nisâ': 11) *After the deceased's spouse receives his/her prescribed share, the remainder of the estate is considered the inheritance of the parents; they are to divide it between them in the same way the whole estate is divided between them if the deceased has neither a descendant heir nor a spouse. This is just like the case when the deceased leaves an unsettled debt or a will; it has to be settled first, then the parents together share the remainder of the estate as one-third for the mother and the rest for the father."*

Endnotes

1 The *'Umariyyatân* (the Two Rulings Attributed to 'Umar Ibnul-Khattâb): Tow cases of inheritance, the first of which involves a husband, a father and a mother of the deceased; the second involves a wife, a father and a mother.

2 Al-Bayhaqî (12299) [6/373], Ad-Dârimi (2756) [2/803], 'Abdur-Razzâq (19015) [10/252] and Ibn Abû Shaybah (31044) [6/243].

CHAPTER

8

Inheritance of Grandmothers

The grandmother meant here is the full grandmother, who is entitled to inherit. In other words, it is every grandmother related to the deceased through the mothers only, such as the maternal grandmother, her mother, the latter's mother, etc. It is also every grandmother related to the deceased through the fathers only, such as the father's mother, the paternal grandfather's mother, and so on. A full grandmother is also the one whose daughter is a mother of the father, a mother of the paternal grandfather, or a mother of the paternal grandfather's father, etc. However, the grandmother who is not entitled to inherit is the one whose son is the mother's father, or the paternal grandmother's father, etc. Such a grandmother does not inherit as she is regarded as a cognate relative.

In short, the grandmother entitled to inherit is either one of three:

- The one whose daughter is either the mother or a maternal grandmother of the deceased; she is related to the deceased only through a female lineage

- The one whose son is either the father or a paternal grandfather of the deceased; she is related to the deceased only through a male lineage
- The one whose daughter is a mother of either the father or a paternal grandfather of the deceased

However, the grandmother who is not entitled to inherit is the one whose son is the mother's father, or the paternal grandmother's father, etc. In other words, she is the one who has a male child whose immediate ancestor and offspring are two females, provided that she is one of them.

The evidence that a grandmother is to inherit is derived from the *Sunnah* (Prophetic Tradition) and scholars' consensus. As for the proof in the *Sunnah*, it is narrated on the authority of **Qabîsah Ibn Dhu'ayb** (may Allah be pleased with him) that:

> *"A grandmother went to Abû Bakr asking him for her share of inheritance. He said, 'There is nothing prescribed for you in Allah's Book (the Qur'ân), nor do I know anything for you prescribed in the Sunnah of the Messenger of Allah (PBUH). Go home until I ask the people. He then asked the people, and Al-Mughîrah Ibn Shu'bah said, 'I had been present with the Messenger of Allah (PBUH) when he gave a grandmother one-sixth of the estate.' Abû Bakr said, 'Is there anyone with you (to testify that the Prophet (PBUH) did so)?' Muhammad Ibn Maslamah stood and said the same as Al-Mughîrah Ibn Shu'bah had said. So Abû Bakr granted her the sixth. Another grandmother came to 'Umar Ibnul-Khattâb asking him for her share of inheritance. He said, 'Nothing has been prescribed for you in Allah's Book but a sixth (of the estate). If there are two of you, it is shared between you, but whoever of you is the only one left gets it all.' "*[1]
>
> (Related by the Five Compilers of *Hadîth* except An-Nasâ'î, and it is deemed *sahîh* (authentic) by At-Tirmidhî)

It is also narrated on the authority of Buraydah who said:

> *"The Prophet (PBUH) entitled the grandmother to one-sixth of the estate in case of the absence of the mother of the deceased."*[2]
>
> (Related by Abû Dâwûd and deemed *sahîh* (authentic) by Ibnus-Sakan, Ibn Khuzaymah and Ibnul-Jârûd)

The aforementioned two *hadîths* imply that a grandmother has the right to inherit one-sixth though, as Abû Bakr As-Siddîq and `Umar Ibnul-Khattâb indicated, there is no ruling for grandmothers in this regard in the Qur'ân. This is because the ruling of inheritance regarding mothers that is mentioned in the Book of Allah is restricted to the direct mother. The grandmother can also be called a mother, as Almighty Allah, says:

"Prohibited to you [for marriage] are your mothers..."
(Qur'ân: An-Nisâ': 23)

But she is not one of those entitled to the prescribed shares of inheritance mentioned in Qur'ân. In spite of this, it is the Messenger of Allah (PBUH) who entitled the grandmother to get one-sixth of the estate, so her inheritance is confirmed by a proof from the *Sunnah* (Prophetic Tradition).

Likewise, a grandmother's inheritance is confirmed by the consensus of scholars. There is no disagreement among scholars regarding the right of inheritance either for the direct maternal grandmother or the direct paternal grandmother; however, they disagreed concerning other grandmothers. Ibn `Abbâs and some scholars entitled grandmothers to inherit however numerous they are, provided they are on the same level of kinship to the deceased, except the grandmother whose son is a non-inheriting grandfather of the deceased, such as the mother of mother's father. Some other scholars are of the opinion that only three grandmothers are entitled to inheritance, namely the mother of the deceased's mother, the mother of the deceased's father, and the mother of the paternal grandfather of the deceased.

The non-existence of the mother of the deceased (such as being dead) is a condition for the grandmother to inherit. This is because the grandmother is related to the deceased through the mother, and the legal principle in this regard states that **whoever is related to the deceased through a certain person is prevented from inheritance by the same person** (except in certain cases). Scholars unanimously agree that the mother excludes all grandmothers from inheritance.

How Grandmothers Inherit

If a grandmother is the only surviving grandmother, with the absence (i.e. death) of the mother, she is to inherit one-sixth of the estate as previously stated. However, the opinion stating that the grandmother, just like the mother, is to get one-third if the deceased has neither a descendant heir nor two or more siblings, is irregular and unreliable.

In case there are more than one grandmother and they are on the same level of kinship to the deceased, they are to equally share one-sixth of the estate as the Prophet's Companions judged in such cases. The reason for this is that they are more than one and that the share of the grandmother(s), which is one-sixth, is independent and equally divided among them, as there is no male heir who can share them their one-sixth share of the estate. Hence, one grandmother is equal to many grandmothers in this case, just like the ruling on the inheritance of more than one wife. So, none of such grandmothers is more privileged, as they all are on the same level of kinship to the deceased. However, if one of them is closer to the deceased, she is to take the one-sixth of the estate alone, whether she is from the paternal or the maternal side. Thus, such a grandmother prevents the other remote grandmothers, as they all are considered mothers sharing the same inheritance, so if they are more than one but with different levels of kinship, the inheritance goes to the closest to the deceased.

The grandmother who is the father's mother is to inherit despite the existence of the father, and, likewise, the grandmother who is mother of the father's father is to inherit despite the existence of the father's father (i.e. her son); thus, she is not excluded by the one though which she is related to the deceased, in contrast to the rule that states: **Whoever is related to the deceased through a certain person is prevented from inheritance by the same person.** This is according to the *hadith* narrated by Ibn Mas'ûd (may Allah be pleased with him) who said regarding the grandmother and her son:

> *"She was the first grandmother whom the Prophet (PBUH) judged to be give a sixth (of the estate) despite the fact that she had a son who was still alive."*[1]
>
> (Related by At-Tirmidhî)

The reason behind this is that the grandmother in this case does not replace the one through whom she is related to the deceased in inheritance, so she is not to be prevented from inheritance in case that person exists.

Shaykhul-Islâm Ibn Taymiyah (may Allah have mercy on him) said:

> *"The opinion of those who maintain that 'Whoever is related to the deceased through a certain person is prevented from inheritance by the same person,' is invalid in every respect, forward and backward. On the one hand, not every one who is related to the deceased by someone is prevented by the latter from inheritance. To illustrate, a*

maternal half brother or a sister is not prevented from inheritance by the existence of the mother. On the other, if the deceased has a son who has died, the latter's son prevents the deceased's paternal uncle from inheritance. Likewise, if the deceased has a brother who has died, the latter's son prevents his paternal uncle from inheritance. There are other examples showing that the exclusion of a person from inheritance can be through the existence of someone whom the former does not relate to the deceased. Rather, the real reason is that whoever gets the share of another is excluded from inheritance by the latter's existence, provided the latter is closer in kinship to the deceased. Since the grandmothers replace the mother in inheritance in case the latter is absent (i.e. dead), they are excluded from inheritance by the mother's existence, even if they do not relate the mother to the deceased. And Allah knows best."

Endnotes

1 Abû Dâwûd (2894 [3/213], At-Tirmidhî (2105) [4/419] and Ibn Mâjah (7224) [3/318].
2 Abû Dâwûd (2895) [3/2014].
3 At-Tirmidhî (2107) [4/421].

CHAPTER

9

Inheritance of Daughters

The deceased's daughter inherits half of the estate on two conditions:

The first condition: is that she is the only daughter of the deceased.

The second condition: is that the deceased does not have a son (or sons) so that they jointly constitute agnation to the deceased.

The evidence is shown in the verse as Allah, the Almighty, says:

> *"Allah instructs you concerning your children [i.e. their portions of inheritance]: for the male, what is equal to the share of the two females. But if there are [only] daughters, two or more, for them is two thirds of one's estate. And if there is only one, for her is half..."* (Qur'ân: An-Nisâ': 11)

The phrase *"...And if there is only one..."* implies the condition that she does not inherit half the estate unless she has no sisters (from the deceased); and the phrase *"...for the male, what is equal to the share of the two females..."*

implies the condition that she must have no brothers who are agnate heirs to the deceased.

The daughter of a late son of the deceased inherits half the deceased's estate on three conditions:

The first condition: is the non-existence of a male relative to make her an agnate heir, namely a brother or a son of her paternal uncle, who are of the same level of kinship to the deceased.

The second condition: is the non-existence of a participant heir of the deceased, namely a sister or a daughter of her paternal uncle, who is of the same level of kinship to the deceased.

The third condition: is the non-existence of a descendant heir who is higher than her in level of kinship to the deceased.

Two daughters or more inherit two-thirds of the estate on two conditions:

The first condition: is that they must be two or more.

The second condition: is the non-existence of an agnate relative of the deceased, namely his son. In this regard, Allah, Exalted be He, says:

"Allah instructs you concerning your children [i.e. their portions of inheritance]: for the male, what is equal to the share of the two females. But if there are [only] daughters, two or more, for them is two thirds of one's estate..." (Qur'ân: An-Nisâ': 11)

The phrase ***"...for the male, what is equal to the share of the two females..."*** indicates that the non-existence of an agnate male relative is a condition so that daughters can inherit two-thirds. The phrase ***"...But if there are [only] daughters, two or more..."*** indicates that they must be two or more.

Some scholars have mistakenly understood the aforementioned verse and thought that two daughters are not to inherit two-thirds of the estate and that they must be three daughters or more. This is the opinion adopted by Ibn 'Abbâs, unlike the majority of scholars who maintain that two daughters or more are to inherit two-thirds of the estate. This is stated in the *hadith* narrated by Jâbir Ibn 'Abdullâh (may Allah be pleased with him) as saying:

"The wife of Sa'd Ibnur-Rabi' went to the Messenger of Allah (PBUH) with her two daughters and said, 'O Messenger of Allah! These are the daughters of Sa'd Ibnur-Rabi' whose father was killed as a martyr

when he was with you at the Battle of Uhud. Their paternal uncle has taken all their property, and he has not left anything for them. Thus, they will not be married unless they have some property.' The Messenger of Allah (PBUH) said, 'Allah will decide regarding the matter. Then the verse of inheritance was revealed. Therefore, the Messenger of Allah (PBUH) called the uncle of the daughters and said to him, 'Give the two daughters of Sa`d two-thirds (of the estate) and their mother an eighth, and what remains is yours."[1]

(Related by the Five Compilers of *Hadith* except An-Nasâ'i and is deemed *hasan* (good) by At-Tirmidhi)

The *hadith* proves that two daughters are to take two-thirds of the estate of the deceased; it is a juristic proof that settles the dispute with regard to this subject and a Prophetic explanation of the verse that states, ***"...But if there are [only] daughters, two or more, for them is two thirds of one's estate..."*** The *hadith* is a demonstration of the meaning, the verse, particularly because the reason for the revelation of this verse is the story of the two daughters of Sa`d Ibnur-Rabi' and the question of their mother regarding their inheritance. Moreover, when this verse was revealed, the Prophet (PBUH) called their uncle to order him to give them their share of estate.

As previously stated, some scholars are of the opinion that three or more daughters, not two or more, are to inherit two-thirds of the estate. The reply to this opinion can be through many proofs. Among them is the fact that Allah, Exalted be He, has entitled the male to inherit a share equal to that of two females; since a female gets one-third in case there is a male, whose degree of agnation is higher, then, with greater reason, she gets one-third in case there is a female like her, whose degree is lower. It is a method of pointing out the major by relating it to the minor. Allah, Exalted be He, has mentioned the share of one daughter literally and that of two daughters by indication. Hence, the phrase ***"...two or more..."*** in the aforementioned Qur'anic verse indicates that the prescribed share of daughters does not increase with their number, even if they are more than two; and Allah knows best.

The two daughters of the deceased's son are regarded as daughters of the deceased himself as regards inheritance (if the deceased's son is dead). So, they are to be given two-thirds whether they are sisters or cousins (daughters of two sons of the deceased) of the same degree of kinship to the deceased. Two-thirds are to be given to the granddaughters of the deceased by means of analogical deduction, i.e. considering them two daughters of the deceased, provided the three following conditions are fulfilled:

1- They must be two or more daughters.

2- The non-existence of an agnate male heir of the deceased, namely a grandson (son of the deceased's son), whether he is their brother or a cousin of the same degree of kinship to the deceased

3- The non-existence of an inheriting descendant of the deceased, for such an heir is higher in level of kinship to the deceased, such as a son or a daughter of the deceased; and Allah knows best[2].

Endnotes

1 Abû Dâwûd (2891) [3/212], At-Tirmidhi (2098) [4/415] and Ibn Mâjah (2720) [3/316].

2 In this regard, it should be taken into consideration that every generation is prior to the following one in inheritance.

CHAPTER

10

Inheritance of Full Sisters

Allah, Glorified and Exalted be He, has instructed the share of full sisters (from the same parents) and paternal half sisters with brothers who are not from the same mother. This is stated in the following verse at the end of the Sura of *An-Nisâ'* (*Women*)[1]:

> ***"They request from you a [legal] ruling. Say, 'Allah gives you a ruling concerning one having neither descendants nor ascendants [as heirs]. If a man dies, leaving no child but [only] a sister, she will have half of what he left. And he inherits from her if she [dies and] has no child. But if there are two sisters [or more], they will have two thirds of what he left. If there are both brothers and sisters, the male will have the share of two females..."***
>
> (Qur'ân: An-Nisâ': 176)

Allah, the Almighty, has also defined the inheritance of maternal half sisters with maternal half brothers in the following verse:

> *"...And if a man or woman leaves neither ascendants nor descendants but has a brother or a sister, then for each one of them is a sixth. But if they are more than two, they share a third..."*
>
> (Qur'ân: An-Nisâ': 12)

According to the two verses mentioned above, the full sister is to be given half of the estate provided that the following four conditions are fulfilled:

The first condition: is the non-existence of an agnate relative, namely, a full brother. This is according to the verse, *"...If there are both brothers and sisters, the male will have the share of two females..."*

The second condition: is the non-existence of a participant heir, namely, a full sister, as Allah, Exalted be He, says, *"...If a man dies, leaving no child but [only] a sister, she will have half of what he left. And he inherits from her if she [dies and] has no child. But if there are two sisters [or more], they will have two thirds of what he left..."*

The third condition: is the non-existence of ascendant male heirs, namely, a father and a paternal grandfather, according to the soundest opinion of scholars with regard to this case.

The fourth condition: is the non-existence of descendant heirs, namely, the son, the grandson by the son in descending lineage, the daughter, the granddaughter by the son however is her father in descending lineage.

The evidence of these two conditions (i.e. the third and the fourth) is that brothers and sisters are the heirs in the case of the *kalâlah*[1] which is the case of the deceased having neither descendants nor ascendants (as heirs).

A paternal half sister inherits half of the estate on five conditions, four of which are the same conditions that govern the inheritance of a full sister mentioned above and the fifth condition is the non-existence of a full brother or sister. This is because they are stronger in their degree of kinship than the paternal half sister.

Two or more full sisters are to inherit two-thirds as stated in the Qur'anic verse, *"...But if there are two sisters [or more], they will have two thirds of what he left..."* However, there are four conditions that must be fulfilled so that they can inherit the two thirds:

The first condition: They should be two or more, according to the verse, ***"...But if there are two sisters [or more]..."***

The second condition: The non-existence of an agnate male relative to them, namely one or more full brothers, as Allah, Exalted be He, says, ***"...If there are both brothers and sisters, the male will have the share of two females..."***

The third condition: The non-existence of descendant heirs who are the children and grandchildren by the sons, as Allah, the Almighty, says, ***"...If a man dies, leaving no child but [only] a sister, she will have half of what he left..." and then Allah says, "... But if there are two sisters [or more], they will have two thirds of what he left..."***

The fourth condition: The non-existence of male ascendant heirs, who is the father according to the consensus of Muslim scholars. The male ascendant heir in this case may be also the paternal grandfather, according to the soundest opinion in this regard.

Two paternal half sisters or more are to inherit two-thirds as there is a consensus that the verse regarding the *kalâlah* is applicable to them ***"...If a man dies, leaving no child but [only] a sister, she will have half of what he left. And he inherits from her if she [dies and] has no child. But if there are two sisters [or more], they will have two thirds of what he left..."*** (Qur'ân: An-Nisâ'; 176) However, they are not to be given the two-thirds unless they fulfill five conditions; the first four conditions are the same like the previously mentioned conditions regarding the inheritance of full sisters.

The fifth condition: is the non-existence of full sisters or full brothers. Hence, if there is one or more full sister or brother, the paternal half sisters are not to inherit two-thirds. They are to be excluded from the inheritance by the existence of a full brother or two full sisters unless they have an agnate relative. However, if it is only one full sister, the paternal half sister(s) is to be given one-sixth to complete the two-thirds.

In case there is only a daughter and one or more granddaughters by the son, the daughter is to take a half and the granddaughter(s) by the son is to take one-sixth as the remainder of the two-thirds. This was the verdict of Ibn Mas`ûd (may Allah be pleased with him) in such a case as he said:

"This was the verdict of the Messenger of Allah (PBUH) in this regard."[3]

(Related by Al-Bukhârî)

The reason for this is that there are more than one daughter for the deceased and hence they are entitled to two-thirds according to the verse in which Allah, Exalted be He, says, "*...But if there are two sisters [or more], they will have two thirds of what he left...*" The daughter is given a half because she is higher in the level of kinship and one-sixth is left for the granddaughter(s) of the son as the remainder of the two-thirds, provided that the following two conditions are fulfilled:

The first condition: The non-existence of an agnate relative to her, namely a grandson (by a son) who is equal to her in the level of kinship whether he is her brother or a male cousin (son of a paternal uncle) of hers.

The second condition: The non-existence of a descendant heir who is higher than her in the level of kinship except the daughter (of the deceased) who inherits a half, as the granddaughter never takes one-sixth except with the daughter.

In case there is a paternal half sister with a full sister, the former takes one-sixth as a remainder of the two-thirds, according to the consensus of scholars as stated by more than one scholar. This is according to the analogical deduction by comparing this case to the case of the granddaughter (by the son) and the daughter. However, the paternal half sister is not to take one-sixth unless two conditions are fulfilled.

The first condition: is that she must have only one full sister who inherits a half as a prescribed share. If, however, there are many full sisters, they exclude the paternal half sister as they together take the two-thirds leaving nothing for her.

The second condition: is the absence of an agnate relative of hers who, in this case, is her brother. If she has a brother, then they (she and her brother) are to inherit the remainder by virtue of agnation, after the full sister receives her share. This remainder will be divided between them on the basis that a male is to receive the share of two females. And Allah knows best.

Endnotes

1 Chapter No. 4 of the Qur'ân.

2 *Kalâlah*: A case related to the rulings on inheritance; in this case the deceasd leaves neither descendants nor ascendants (as heirs).

3 Al-Bukhâri (6736) [12/21].

CHAPTER

11

Inheritance of Sisters with Daughters and Inheritance of Maternal Siblings

In case there is a daughter (of the deceased) or more, with one or more full or paternal half sisters (of the deceased), the existing daughter(s) whether one or more is/are to be given her/their prescribed share. However, the majority of scholars from amongst the Companions and the Successors of the Companions believe that full sisters or paternal half sisters form an agnate relation with the daughters. This is what the scholars of inheritance call "agnation with other relatives." Thus, they are to be given whatever remains from the prescribed share of the daughters or son's daughter. This is illustrated in the *hadith* related by Al-Bukhârî and other compilers of *Hadîth* that states:

> *"Abû Mûsâ (may Allah be pleased with him) was asked regarding a case of inheritance in which the deceased had left a daughter, a*

> *son's daughter, and a sister. He said, 'The daughter is to take one-half and the sister is to take one-half.' Abû Mûsâ added, 'Go to Ibn Mas`ûd and he will tell you the same.' Ibn Mas`ûd was asked and was told of Abû Mûsâ's verdict. Ibn Mas`ûd then said, '(If I give the same verdict,) I would stray and would not be of the rightly-guided. The verdict I will give in this case will be the same as that of the Prophet (PBUH); one-half is for the daughter, one-sixth for the son's daughter so that both shares make two-thirds of the total estate, and the rest is for the sister.' "*[1]

This *hadith* is a clear proof that the sister, with the existence of a daughter, is considered an agnate relative and is to be given what remains from the prescribed share of the daughter and the son's daughter.

A maternal sibling, whether a male or a female, is to inherit one-sixth and if they are two or more, they are to inherit one-third and then it is to be divided equally among them, whether males or females. In this regard, Allah, Exalted be He, says,

> ***"...And if a man or woman leaves neither ascendants nor descendants but has a brother or a sister, then for each one of them is a sixth. But if they are more than two, they share a third..."***
>
> (Qur'ân: An-Nisâ': 12)

Muslim scholars have unanimously agreed that the siblings intended in the verse are maternal half brothers and sisters. It was even recited by Ibn Mas`ûd and Sa`d Ibn Abû Waqqâs in the following way of recitation: ***"...but has a brother or a sister by the same mother..."*** Allah, Exalted be He, has mentioned the siblings in this verse without giving preference to anyone over the other, accordingly, the female is equal to the male in this regard[2]. **Imâm Ibnul-Qayyim** (may Allah have mercy on him) said, *"This is the sound analogical deduction and the balance that conforms with the meaning of the Qur'anic verse and the understanding of the prominent Companions of the Prophet (PBUH)."*

One maternal sibling is to inherit one-sixth provided that the three following conditions are fulfilled:

The first condition: The non-existence of a descendant heir

The second condition: The non-existence of an ascendant male heir (such as a father of the deceased or the deceased's paternal grandfather, and so forth in ascending lineage)

The third condition: He or she must be alone.

As for the inheritance of maternal siblings, they are to inherit one-third under three conditions. They are as follows:

The first condition: They must be two or more whether males, females, or both males and females.

The second condition: The non-existence of a male descendant heir, namely a deceased's son or a grandson (by the son) and so forth in descending lineage.

The third condition: The non-existence of an ascendant male heir, namely the father and the paternal grandfather and so forth in ascending lineage.

The maternal siblings are characterized by five rulings:

The first and the second rulings: There is no preference for the male over the female among them in inheritance, whether there is one maternal sibling or more. In case there is only one sibling, Allah, Exalted be He, says, "***...And if a man or woman leaves neither ascendants nor descendants but has a brother or a sister, then for each one of them is a sixth...***" and in case they are many, Allah, Exalted be He, says, "***...But if they are more than two, they share a third...***" According to the majority of Muslim scholars, the meaning of *kalâlah* is: the one who dies leaving neither ascendants nor descendants; thus, the non-existence of ascendants and descendants is a condition in such a case. The descendants include the male and the female children and grandchildren (children of the deceased's son) and so forth in descending lineage, and the ascendants include the father and the paternal grandfather and so forth in descending lineage. As a proof that there is no preference for the male over the female in this case, Allah, Exalted be He, says, "***...But if they are more than two, they share a third...***" Therefore, it is clear that Allah has entitled them to share the inheritance together, and the sharing indicates that each one is given an equal share. The wisdom behind this, Allah knows best, is that they are relatives on the maternal side only, and they all are the same with regard to this. Hence, there is no preference for the male over the female in contrast to kinship through the paternal side.

The third ruling: The male sibling is related to the deceased through a female relative (i.e. his mother), yet he still has the right to inherit in contrast to others who do not inherit if the relation to the deceased is through a female such as the case of a son of a daughter.

The fourth ruling: They partially exclude whoever caused their relation to the deceased and decrease his share (namely the mother in this case). Therefore, the mother's share of the estate in this case decreases from one-third to one-sixth,[3] as she is the cause of their relationship to the deceased. This ruling comes in contrast with the general rule which states that whoever is related to the deceased through a certain person is prevented from inheritance by the same person.

The fifth ruling: They inherit with the one through whom they are related to the deceased, i.e. their mother, while this is not the case normally. For example, the son's child (male or female) is not to inherit with the son. However, the paternal grandmother (i.e. the mother of a father, the mother of the paternal grandfather and so forth in ascending lineage) resembles the maternal siblings in this ruling, as she is related to the deceased through her son, and yet she still has the right to inherit, despite the existence of her son.

To conclude, whoever is related to the deceased through a certain person is not prevented from inheritance by the same person unless the latter replaces the former in inheritance. However, if the latter does not replace the former, then there is no exclusion. This is as in the case of maternal siblings; they do not inherit the share of the mother in case of her non-existence. Similarly, the paternal grandmother (mother of the father or mother of the paternal grandfather and so forth in ascending lineage) does not take the father's or the paternal grandfather's shares, but she is to inherit with any of them by virtue of motherhood in case of the mother's non-existence; and Allah knows best.

Endnotes

1 Al-Bukhârî (6736) [12/21].
2 Al-Bayhaqî (12322) [6/379].
3 The share of the deceased's mother decreases from one-third to one-sixth of the estate if the deceased has siblings, whether they are full or half siblings, and whether they inherit or not.

CHAPTER

12

Agnation

Agnation linguistically in Arabic refers to the meaning of supporting. In the rules of inheritance, the word refers to one's agnate relative(s). Thus, the agnate relatives of a person are his relatives from the paternal side: the father, the son, the (full or paternal half) brother and the father's (full or half paternal) brother. According to the laws of inheritance, the agnate relative is the person who gets an undefined share, because if he is alone without any other claimants to the inheritance, he gets the whole estate. However, if he is not alone, he is to get what remains after the prescribed shares of inheritance are distributed. This is according to the *hadith* of the Prophet (PBUH):

> *"Give the shares of the inheritance (prescribed in the Qur'ān) to those who are entitled to receive them. Then whatever remains should be given to the closest male relative of the deceased."*[1]

Agnation is divided into three categories: being an agnate relative by oneself, being an agnate relative by other relatives, and being an agnate relative with other relatives.

The First Category: Agnation by Oneself

This category includes all males concerning whom there is a consensus that they are entitled to inherit except the husband and the maternal half brother. Those who are agnate relatives by themselves are fourteen: The son, the son's male child and so forth in descending lineage, the father, the paternal grandfather and so forth in ascending lineage, the full brother and the paternal half brother, the son of a full brother or the paternal half brother and so forth in descending lineage, the father's full brother and the father's paternal half brother and so forth in ascending lineage, the son of a full or a half-paternal uncle and so forth in descending lineage. It also includes the manumitter, male or female, of a slave[2].

The Second Category: Agnation by Other Relatives

This category includes four groups:

1- One or more daughters of the deceased with one or more sons of the deceased.

2- The daughter(s) of the deceased's son's with one or more of the deceased's son's male children, provided that he should be at the same level of kinship with her whether he is her brother or her paternal cousin. She could also be an agnate relative by the grandson who is lower than her in the level of kinship to the deceased. The evidence that these two groups are categories of being an agnate relative by other relatives is shown in the noble verse in which Allah, Exalted be He, says:

"Allah instructs you concerning your children [i.e. their portions of inheritance]: for the male, what is equal to the share of the two females..." (Qur'ān: An-Nisā': 11)

This noble verse considers the children and the son's grandchildren.

3- One or more full sister of the deceased with one or more full brother of the deceased.

4- One or more paternal half sister of the deceased with one or more paternal half brother of the deceased. The evidence regarding the last two groups is shown in the verse that reads:

"...If there are both brothers and sisters, the male will have the share of two females..." (Qur'ān: An-Nisā': 176)

The verse considers full siblings and paternal side half siblings. Thus, the sisters of the following male relatives of the deceased are to inherit by virtue of agnation by them: the deceased's son, the deceased's son's male child, the deceased's full brother and the deceased's paternal half brother. However, the sisters of other male relatives of the deceased do not share them in inheritance, such as sisters of the deceased's male nephews, the sister's of the deceased's paternal uncles, and the sister's of the deceased's paternal cousins.

The Third Category: Agnation with Other Relatives

This category is divided into two kinds:

1- One or more full sister of the deceased with one or more daughter of the deceased or with one or more of the deceased's son's daughter.

2- One or more paternal half sister of the deceased with one or more daughter of the deceased or with one or more of the deceased's son's daughter.

This is the opinion of the majority of scholars from amongst the Companions of the Prophet (PBUH), the Successors of the Companions, and those who came after them. They say that the full sisters and the paternal half sisters of the deceased become agnate relatives with the deceased's daughters or the deceased's son's daughters. The evidence is illustrated in the *hadîth* that states:

> *"Abû Mûsâ (may Allah be pleased with him) was asked regarding (the inheritance of) a daughter, a son's daughter, and a sister. He said, 'The daughter is to take one-half and the sister is to take one-half.' Abû Mûsâ added, 'Go to Ibn Mas'ûd and he will tell you the same.' Ibn Mas'ûd was asked and was told of Abû Mûsâ's verdict. Ibn Mas'ûd then said, '(If I give the same verdict,) I would stray and would not be of the rightly-guided. The verdict I will give in this case will be the same as that of the Prophet (PBUH); one-half is for the daughter, one-sixth for the son's daughter so that both shares make two-thirds of the total estate, and the rest is for the sister.' "*[3]
>
> (Related by the Group of Compilers of *Hadîth*[4] except Imâm Muslim and An-Nasâ'î)

The agnate relative by oneself gets the whole estate if he is alone, as Allah, Exalted be He, says:

"...And he inherits from her if she [dies and] has no child..."

(Qur'ân: An-Nisâ': 176)

Thus, in this case the brother is to inherit all the estate of his sister. Only the agnate relative by oneself enjoys such a ruling, but such an agnate relative shares the rest of agnate relatives in inheriting what remains after the prescribed shares of inheritance are distributed. This is based on the *hadîth* of the Prophet (PBUH):

> *"Give the shares of the inheritance (prescribed in the Qur'ân) to those who are entitled to receive them. Then whatever remains should be given to the closest male relative of the deceased."*[5]

However, if nothing remains after the legal heirs take their prescribed shares, the agnate relatives inherit nothing.

There are six sides for the agnate relations; they are respectively as follows: filiation, paternity, brotherhood, brother's sons, relationship of the paternal uncle, and *walâ'*,[6] which is –as mentioned before– caused by the favor the manumitter does for the manumitted. The following *hadîth* of the Prophet (PBUH) illustrates this as he says:

> *"Verily, the walâ' is for the emancipator."*[7]
>
> (Related by Al-Bukhâri and Muslim)

In case two or more agnate relatives are involved, they have one of the following four cases:

The first case: They may share the same agnation **side**, the same **level** of kinship, and the **degree** of kinship. In this case, they share the inheritance together such as the sons, the full brothers and paternal uncles.

The second case: They may differ in their agnation **side** only. Thus, the one having the closest **side** of kinship has the priority in inheritance (according to the above-mentioned order), such as the case of a son and a father. In this case, the son has more priority than the father by agnation.

The third case: They may share the same agnation **side** and differ in the **level** of kinship such as the case with the son and the son's male child. In this case, the son has the priority over the grandson, as he is closer to the deceased in the **level** of kinship.

The fourth case: They may share the same agnation side and level of kinship but differ in the degree of kinship so that one of them is stronger in degree than the other. In this case, the one having the strongest degree of kinship will have the priority such as a full brother with a paternal half brother. Thus, the full brother has the priority over the paternal half brother, as the full brother is related to the deceased through the two parents while the paternal half brother is related to the deceased through the father only.

Endnotes

1 Al-Bukhârî (6732) [12/14] and Muslim (4117) [6/54].
2 This is because the Messenger of Allah (PBUH) said, "The *walâ'* (i.e. loyalty by virtue of emancipation) is a bond like that of kinship."
3 Al-Bukhârî (6736) [12/21].
4 The Group of Compilers of *Hadîth* are Al-Bukhârî, Muslim, Ahmad, Abû Dâwûd, At-Tirmidhî, An-Nasâ'î, and Ibn Mâjah.
5 Al-Bukhârî (6732) [12/14] and Muslim (4117) [6/54].
6 *Walâ'*: The freed slave's loyalty by virtue of emancipation.
7 Al-Bukhârî (2535) [5/206] and Muslim (3767) [5/387].

CHAPTER 13

Prevention from Inheritance (*H̲ajb*)

This chapter has a specific importance among the rulings on inheritance because knowing its details will help assign rights to those deserving them. On the contrary, unawareness of the rulings on such an issue may cause great harm, as the inheritance might be given to those who are not legal heirs while depriving the right persons from it. Therefore, some scholars say,

> *"It is prohibited for those who do not know the rulings on prevention (h̲ajb) to give a fatwa concerning a matter of the rules of inheritance."*

According to the scholars of inheritance, "*h̲ajb*" means preventing someone, who is entitled to inherit, partially or totally, from receiving all his/her share of inheritance (according to the relevant rulings).

Prevention from inheritance is divided into two categories:

The First Category: Prevention by Description

This means that someone is characterized by something that causes him to be totally prevented from inheritance. The three reasons that cause one to be totally prevented from inheritance are: being a slave, being a murderer, or being of a different religion than that of the deceased. Those who have any of these characteristics do not inherit, and their existence or non-existence makes no difference in this regard.

The Second Category: Prevention by Persons

This means that a specific person is either excluded from the inheritance altogether and this is called "complete prevention", or that this person is prevented from receiving a bigger share of the inheritance but allowed to receive a smaller one, and this is called "partial prevention". The reason for this category of prevention is the existence of a person who is more entitled to that inheritance than the one prevented, and that is why it is called "prevention by persons". This category is divided into seven types, four of which occur as a result of the presence of many different kinds of legal heirs and the other three occur due to the transition from one state to another as a result of the existence of other heirs. These seven types are as follows:

First: The transition from one type of a prescribed share to a lower one, such as the alteration of the husband's share from a half to a quarter.

Second: The transition from one category of agnation to another one that is lower, such as the alteration of the (full or the paternal half) sister from being an agnate **with** other relatives to being an agnate **by** other relatives.

Third: The transition from being entitled to a prescribed share to a category of agnation lower than the prescribed share, such as the alteration of the female heir from being entitled to inherit a half as a prescribed share to being an agnate **by** other relatives.

Fourth: The transition from being entitled to inherit by agnation to inherit a smaller prescribed share, such as the alteration of the father or the paternal grandfather from the inheritance by virtue of agnation to the inheritance by virtue of a prescribed share.

Fifth: The increase in the number of legal heirs to a particular prescribed share, such as the increase in the number of wives sharing the same one-fourth or one-eighth of the estate.

Sixth: The increase in the number of legal heirs in agnation, such as the increase of agnate heirs in sharing the whole estate or the remainder after distributing the prescribed shares.

Seventh: The increase in the number of legal heirs as a result of the *'awl*,[1] such as the increase of the number of those entitled to prescribed shares in cases of the *'awl*. Thus, each one of these legal heirs is to take his legal share reduced in amount as a result of this increase.

Prevention is governed by some rules as follows:

The first rule: Whoever is related to the deceased through a certain person is prevented from inheritance by the same person (bearing in mind what has been previously mentioned in this regard), such as the case of a son's male child with the son, the maternal grandmother with the mother, the paternal grandfather with the father, and brothers with the father.

The second rule: In case two or more agnate heirs are involved, the one who is closer in the agnation side will have the priority in inheritance. Hence, if there is a son and a father or a paternal grandfather, the agnation is claimed to the son as he is of the closest side. In case they both share the same agnation side, the closer one to the deceased has the priority over the other, as in the case of a son and a son's male child, or the case of a full brother and the son of another full brother, and so forth. If the relatives involved are equal in their agnation side and level to the deceased, the one of the stronger degree of kinship has the priority in inheritance, such as in the case of a full brother and a paternal half brother. In this case, the full brother has the priority over the paternal half brother, as the full brother is related to the deceased through the two parents while the paternal half brother is related to the deceased through the father only.

The third rule: This rule concerns the **complete prevention**. An ascendant heir is not to be prevented from the inheritance except by another ascendant heir. For example, a paternal grandfather is only prevented by a father or another paternal grandfather who is closer

to the deceased. Also, a grandmother cannot be prevented except by a mother or another grandmother who is closer to the deceased. Likewise, a descendant heir is not to be prevented from the inheritance except by another descendant heir. For example, a son's male child is only prevented by a son or another grandson of a higher level of kinship. In addition, the collateral relatives, namely the brothers and their sons, and the paternal uncles and their sons, may be prevented by ascendant heirs, descendant heirs or collateral relatives. For example, the paternal half brothers of the deceased are prevented from the inheritance by the deceased's son, a deceased's son's male child, and so forth in descending lineage. They are also prevented by the father of the deceased or the deceased's paternal grandfather (and so forth in ascending lineage), according to the soundest opinion of scholars in this regard. Moreover, the paternal half brother(s) is prevented from inheritance by a full brother and a full sister if she is an agnate relative with another relative. Thus, the paternal half brother, as illustrated, is prevented by ascendant, descendant and collateral relatives.

Again, it is important to stress that the issue of prevention from inheritance (*hajb*) is very important; therefore, whoever is assigned to give *fatwa* regarding the rules of inheritance should be completely well-versed in its ruling and even apply them practically lest he should give a wrong *fatwa* and consequently change the legal rulings of inheritance and deprive the legal heirs from their rights. And Allah is the One Who grants success.

Endnotes

1 *'Awl*: An increase in the number of shares and a decrease in their amounts according to the deserving parties.

CHAPTER 14

Inheritance of Siblings[1] with the Paternal Grandfather

With regard to this case, Imâm Ahmad, Imâm Ash-Shâfi`î and Imâm Mâlik adopted the opinion stated by Zayd Ibn Thâbit (may Allah be pleased with him). Also, Abû Yûsuf and Muhammad Ibnul-Hasan, the two Disciples of Imâm Abû Hanîfah, as well as many of the men of religious knowledge have adhered to this opinion.

According to this opinion, there are three cases of the siblings existing with the paternal grandfather:

1-They may be full siblings.

2-They may be paternal half siblings.

3-They may include both types, full siblings and paternal half siblings.

In this respect, if the siblings with the paternal grandfather are either full or paternal half siblings, the grandfather has two cases with them:

The first case: When there is no other heir by virtue of prescribed share. In such a case, there are three cases for the paternal grandfather as follows:

A) **When the *muqâsamah*[2] entitles the paternal grandfather to get more than one-third of the estate**: The criterion of this case is that the siblings' share is less than double the paternal grandfather's share. For example, their share can be equal to one and a half of the paternal grandfather's share or less than that. This case involves five forms:

1- The deceased's paternal grandfather and one sister of the deceased; in this case, the paternal grandfather gets two-thirds of the estate.

2- The paternal grandfather and one brother; in this case, the grandfather gets one-half of the estate.

3- The paternal grandfather and two sisters; in this case, he gets half the estate (similar to the second form) which is more than one-third.

4- The paternal grandfather and three sisters; in this case, he gets two-fifths, which are more than one-third.

5- The paternal grandfather and one brother and one sister; in this case, the grandfather gets two-fifths, just like the fourth case.

B) **When the paternal grandfather gets one-third of the estate, whether through the *muqâsamah* or not.** The criterion of this case is that the siblings' share is double the paternal grandfather's share. This case involves three forms:

1- The deceased's paternal grandfather and two brothers

2- The paternal grandfather and one brother and two sisters

3- The paternal grandfather and four sisters

In these forms, the paternal grandfather gets one-third of the estate, whether through the *muqâsamah* or not. With regard to this issue, there is disagreement among scholars, whether the paternal grandfather is to receive his share, which is one-third, through the *muqâsamah* as an agnate relative or receive it as a prescribed share, or that he is to be given the option to receive it through either of the two ways. Some scholars give preponderance to the opinion that the paternal grandfather is to receive one-third of the estate as a prescribed share

rather than the *muqâsamah*. This is because considering the prescribed share, whenever possible, is worthier, for the prescribed share has more consideration. Moreover, those entitled to prescribed shares are given preponderance to the agnate relatives. And Allah, Exalted be He, knows best.

C) **When one-third of the estate yields more than the share that the paternal grandfather will get through the *muqâsamah*.** In this case, the paternal grandfather gets one-third of the estate as a prescribed share. This is when the siblings' share is more than double his share. However, there are no limited forms for such a case, unlike the two previous cases. The least number in such a case is the existence of the deceased's paternal grandfather and two brothers and one sister, or the paternal grandfather and five sisters, or the paternal grandfather and one brother and three sisters, and upward.

The second case: When there is one entitled to a prescribed share besides the deceased's paternal grandfather and siblings. There are seven cases for the paternal grandfather as follows:

A- He is to get his share through the *muqâsamah*

B- He is to get one-third of the remainder of the estate (after the prescribed shares are distributed)

C- He is to get one-sixth of the estate

D- When his share through the *muqâsamah* is equal to one-third of the remainder

E-When his share through the *muqâsamah* is equal to one-sixth of the estate

F-When his prescribed one-sixth of the estate is equal to one-third of the remainder

G- When his share through the *muqâsamah* is equal to one-sixth of the estate as well as one-third of the remainder

To tackle these cases in detail, they are as follows:

A- The paternal grandfather is to get his share through the *muqâsamah* when his share through the *muqâsamah* is more than one-third of the remainder of the estate (after the prescribed shares are distributed) as well as one-sixth of the estate. An example of this case is when the deceased has left a husband, a paternal grandfather, and one brother.

That is, when the prescribed share amounts to half the estate (that goes to the husband) and the siblings' share is less than double the paternal grandfather's share.

In this case, the paternal grandfather is to get his share through the *muqâsamah* as the remainder of the estate is one-half, after giving one-half to the husband. This remaining half is to be equally divided between the paternal grandfather and the brother (due to the *muqâsamah*). No doubt that one-fourth of the estate is more than either one-third of the remainder or one-sixth of the estate. Thus, the estate is to be divided as follows: one-half is for the husband as a prescribed share, one-fourth is for the paternal grandfather, and one-fourth is for the brother. This can be illustrated in the following table:

<table>
<tr><th colspan="3">The estate</th></tr>
<tr><td>Husband</td><td colspan="2">1/2</td></tr>
<tr><td>Paternal grandfather</td><td rowspan="2">1/2</td><td>1/4</td></tr>
<tr><td>Brother</td><td>1/4</td></tr>
</table>

B- The paternal grandfather is to get one-third of the remainder of the estate (after the prescribed shares are distributed). This is when one-third of the remainder is more than the share received through the *muqâsamah* and more than one-sixth of the estate as well. An example of such a case is when the deceased has left a mother, a paternal grandfather and five brothers, and suchlike cases when the prescribed share is less than half the estate (namely one-sixth, which goes to the mother in this case) and that the siblings' share is more than double the paternal grandfather's share.

The paternal grandfather gets one-third of the remainder of the estate (after the mother gets her prescribed share, namely one-sixth) in this case as the remaining five sixths are to be distributed among the paternal grandfather and the five brothers. So, the paternal grandfather gets one-third of the five-sixths that equals (1⅔) and the five brothers take the other two thirds of the five-sixths. Undoubtedly, the one-third of the remainder going to the paternal grandfather is more than the share he would have got through the *muqâsamah* and also more than one-sixth of the estate. However, one-third of the

remaining five-sixth is not a natural number. Therefore, for easier calculations, we can get the common denominator by multiplying 3 by 6 and deal with case as an 18-share estate. Thus, the mother gets her prescribed share (one-sixth) that equals three shares, i.e. 3/18. The paternal grandfather gets one-third of the remainder, which equals five shares, i.e. 5/18. The five brothers get the other two thirds of the remainder, i.e. 10/18; each gets two shares, i.e. 2/18. This can be shown in the following table:

	6 X 3	**18 shares**
Mother	1	3
Paternal grandfather	$1\frac{2}{3}$	5
5 brothers	$3\frac{1}{2}$	10 (2 for each)

C- The paternal grandfather is to get one-sixth of the estate when one-sixth of the estate is more than the share he would have got through the *muqâsamah* and also more than one-third of the remainder. An example of this case is when the deceased has left a husband, a mother, a paternal grandfather and two brothers, and suchlike cases in which the prescribed shares reach two-thirds of the estate and that the siblings' share is more than the share of the paternal grandfather.

The paternal grandfather is to get one-sixth of the estate in this case as the husband gets one-half of the estate, the mother gets one-sixth, and the remaining third of the estate go to the two brothers and the paternal grandfather. Undoubtedly, the one-sixth that goes to the paternal grandfather is more than one-third of the remainder and also more than the share he would have got through the *muqâsamah*. However, dividing the remaining one-sixth of the estate is not a natural number. Therefore, for easier calculations, we can get the common denominator by multiplying 2 by 6 and deal with case as a 12-share estate. Thus, the husband gets his one-half of the estate, namely six shares, i.e. 6/12. The mother gets one-sixth of the estate which is two shares, i.e. 2/12. The paternal grandfather gets one-sixth of the estate as well, which is two shares, i.e. 2/12. The two brothers get two shares, i.e. 2/12: one share for each. This can be illustrated in the following table:

	6X2	12 shares
Husband	3	6
Mother	1	2
Paternal grandfather	1	2
Two brothers	1	2 (1 for each)

D- When the paternal grandfather's share through the *muqâsamah* is equal to one-third of the remainder of the estate (after the prescribed shares are distributed) and also more than one-sixth of the estate. An example of this case is when the deceased has left a mother, paternal grandfather, and two brothers, and suchlike cases in which the prescribed shares are less than half the estate and the siblings' share is double the share of the paternal grandfather.

The paternal grandfather's share through the *muqâsamah* is equal to one-third of the remainder of the estate in this case as the mother gets her one-sixth as a prescribed share and the remaining five-sixths go to the paternal grandfather and the two brothers. The one-third of the remainder equals (1⅔), which is equal to the paternal grandfather's share through the *muqâsamah*. However, one-third of the remainder is not a natural number. Therefore, for easier calculations, we can get the common denominator by multiplying 3 by 6 and deal with case as an 18-share estate. Thus, the mother gets one-sixth of the estate as a prescribed share, which is (3/18). The paternal grandfather gets five shares (5/18) either through the *muqâsamah* or as one-third of the remainder. The two brothers get ten shares (10/18): five shares (5/18) for each[3]. This is shown in the following table:

	6X3	**18 shares**
Mother	1	3
Paternal grandfather	1⅔	5
Two brothers	3½	10 (5 for each)

E- When the paternal grandfather's share through the *muqâsamah* is equal to one-sixth of the estate and that each yields more than one-third of the remainder of the estate (after the prescribed shares are distributed). An example of this case is when the deceased has left a husband, a grandmother, a paternal grandfather, and one brother,

and suchlike cases in which the prescribed shares are equal to two-thirds of the estate and the existent siblings' share is equal to that of the paternal grandfather.

The paternal grandfather's share through the *muqâsamah* is equal to one-sixth of the estate in this case as the husband gets one-half of the estate as a prescribed share and the grandmother gets one-sixth. The remaining two-sixths go to the paternal grandfather and the brother; the paternal grandfather gets one-sixth of the estate either through the *muqâsamah* or as a prescribed share, and the other sixth goes to the brother. This is illustrated in the following table:

	6 shares
Husband	3
Grandmother	1
Paternal grandfather	1
Brother	1

F- When his prescribed one-sixth of the estate is equal to one-third of the remainder (after the prescribed shares are distributed). An example of this case is when the deceased has left a husband, a paternal grandfather and three brothers, and suchlike cases in which the prescribed shares are equal to one-half of the estate and the siblings' share is more than double the share of the paternal grandfather.

The paternal grandfather's prescribed one-sixth of the estate is equal to one-third of the remainder in this case as the husband gets the one-half of the estate as a prescribed share, and the paternal grandfather and the three brothers share the other half. In this case, one-sixth of the estate is equal to one-third of the remainder. However, one-third of the remainder is not a natural number. Therefore, for easier calculations, we can get the common denominator by multiplying 2 by 3 and deal with case as a 6-share estate. Thus, the husband gets three shares, i.e. one-half of the estate; (3/6). In the same way, we get another common denominator by multiplying 3 by 6 and deal with the whole case as an 18-share estate. Accordingly, the husband gets half the estate (nine shares) as a prescribed share, namely (9/18), the paternal grandfather gets three shares (3/18), and the three brothers get the other six shares (6/18). This can be illustrated in the following table:

	2X3	6X3	18 shares
Husband	1	3	9
Paternal grandfather	⅓	1	3
Three brothers	⅔	2	6 (2 for each)

G- When the paternal grandfather's share through the *muqâsamah* is equal to one-sixth of the estate as well as one-third of the remainder (after the prescribed shares are distributed). An example of this case is when the deceased has left is a husband, a paternal grandfather and two brothers, and suchlike cases in which the prescribed shares equal half the estate and the siblings' share is double that of the paternal grandfather.

The paternal grandfather's share through the *muqâsamah* is equal to one-sixth of the estate as well as one-third of the remainder in this case as the husband gets half the estate and the remaining half goes to the paternal grandfather and the two brothers. Thus, the one-third of the remainder, the paternal grandfather's share through the *muqâsamah* and the one-sixth of the estate are all equal. However, one-third of the remainder is not a natural number. Therefore, for easier calculations, we can get the common denominator by multiplying 2 by 3 and deal with case as a 6-share estate. So, the husband gets three shares (3/6), which represent half the estate, the paternal grandfather gets one share (1/6) and the two brothers get the remaining two shares (2/6); one for each. See the following table:

	2X3	6 shares
Husband	1	3
Paternal grandfather	⅓	1
Two brothers	⅔	2 (1 for each)

Note

As for the remainder of the estate after the prescribed shares are distributed, there are four cases for the paternal grandfather:

(1) If the remainder is more than one-sixth of the estate, the paternal grandfather gets the largest share of the three alternatives, namely the *muqâsamah*, one-third of the remainder or one-sixth of the estate.

(2) If the remainder equals one-sixth of the estate, then it goes to the paternal grandfather as a prescribed share.

(3) If the remainder is less than one-sixth of the estate, the paternal grandfather is entitled to get one-sixth of the estate as a prescribed share, and so the case is subject to the rules of *'awl*[4].

(4) If there is nothing left for the paternal grandfather after dividing the prescribed shares, then the paternal grandfather is entitled to get one-sixth of the estate as a prescribed share, and so the case is subject to the rules of *'awl*, as in the former case.

In the last three cases, the siblings have no shares, except for the sister in the case called the *Akdariyyah*[5] on which we will elaborate later[6].

Note

In some cases, the paternal grandfather gets one-third of the remainder by analogy with the mother in the two cases known as the *'Umariyyatân* (the two rulings attributed to 'Umar Ibnul-Khaṭṭâb). This is because both the paternal grandfather and the mother are considered ascendants of the deceased. On the other hand, if there is no a legal heir entitled to prescribed shares, each of the paternal grandfather and the mother gets one-third of the estate.

If there is a legal heir entitled to prescribed shares, the paternal grandfather gets one-third of the remainder and the remaining part goes to the siblings. When there are siblings, the paternal grandfather is not to receive one-third of the estate, as this will cause harm to the shares of the siblings. The paternal grandfather gets one-sixth as he does not get less than one-sixth despite the existence of the deceased's son(s), who is the most entitled inheriting heirs. Hence, with greater reason, the paternal grandfather's share does not decrease with other heirs[7].

Endnotes

1 "Siblings" here refers only to the full siblings or the half paternal ones, i.e. they must be from the same father.

2 *Muqâsamah*: It means that the paternal grandfather is regarded as one of the siblings in inheritance.

3 See: *'Al-Fawâ'id Al-Jaliyyah'* p. 21-22 and *'Sharh Ash-Shanshûri `Alâ Ar-Rahbiyyah bi-Hâshiyat Al-Bâijûri'* p. 134-138.

4 *'Awl*: An increase in the number of shares and a decrease in their amounts according to the deserving parties.

5 The *Akdariyyah:* The case including a husband, a mother, a paternal grandfather and one full sister.

6 See the footnotes in *Al-Bâjûri'* p. 138.

7 See *Al-'Adhb Al-Fâ'id* (1/110).

CHAPTER

15

The *Mu`âddah*[1]

What has been previously discussed, namely the inheritance of the paternal grandfather besides the siblings, is related to the case of the existence of only one type of siblings, either full siblings or paternal half siblings. As for the case when there are a paternal grandfather, full siblings and paternal half siblings, then the full siblings count their paternal half siblings in their favor against the paternal grandfather to decrease his share. Then, after the paternal grandfather takes his share, the full siblings take the share of the paternal half siblings. If there is only one full sister existing, she gets her prescribed share in full and the remainder goes to the paternal half siblings.

Thus, the full sibling counts the paternal half sibling against the paternal grandfather, as they both types of siblings share the same father, and that the side of the mother of the full siblings is blocked by the existence of the paternal grandfather. So, the full sibling counts the paternal half sibling against the paternal grandfather to decrease the latter's share in case he gets it through the *muqâsamah* so that he gets at most one-third of the estate, or one-third of the remainder of the estate, or one-sixth of the estate.

Another reason behind the *mu'âddah* is that the full siblings and the paternal half siblings are equally related to the paternal grandfather, as they all are his son's children. Thus, the paternal half siblings are considered in the division of the estate, which is not in favor of the paternal grandfather. After the paternal grandfather's share decreases (due to the existence of the paternal half siblings), the full siblings block the paternal half siblings and take their share, as if there is no paternal grandfather[2].

When is the *Mu'âddah* Considered?

This method is effected when the full siblings' share less than double the paternal grandfather's share, and that the remainder after distributing the prescribed shares is more than one-fourth of the estate. But if the siblings' share is equal to double the paternal grandfather's share or more, then there will no need to apply the *mu'âddah.*

The Forms of the *Mu'âddah*:

There are sixty-eight cases in which the method of the *mu'âddah* is applied. The reason for restricting the forms of the *mu'âddah* to such a number is that the full siblings' share must be less than double the paternal grandfather's share. There are only five forms in this regard, and they are as follows:

1) A paternal grandfather and one full sister
2) A paternal grandfather and two full sisters
3) A paternal grandfather and three full sisters
4) A paternal grandfather and one full brother
5) A paternal grandfather and one full brother and one full sister

These five forms may involve paternal half siblings so that the siblings' share may reach double the share of the paternal grandfather or less.

1) **A paternal grandfather and one full sister:** This form involves five possible cases as follows:
   - One full sister and a paternal half sister
   - One full sister and two paternal half sisters
   - One full sister and three paternal half sisters
   - One full sister and a paternal half brother
   - One full sister and a paternal half brother and a paternal half sister

2) **A paternal grandfather and two full sisters:** This form involves three possible cases as follows:

- Two full sisters and a paternal half sister
- Two full sisters and two paternal half sisters
- Two full sisters and a paternal half brother

3) **A paternal grandfather and three full sisters:** This form involves only one possible case:

- Three full sisters and one paternal half sister.

4) **A paternal grandfather and one full brother:** This form involves three possible cases as follows:

- One full brother and one paternal half sister
- One full brother and two paternal half sisters
- One full brother and one paternal half brother

5) **A paternal grandfather and one full brother and one full sister:** This form involves one possible case:

- One full brother and one full sister and a paternal half sister.

The above-mentioned are thirteen cases, all of which may or may not include legal heirs who are entitled to prescribed shares. In case there are heirs entitled to prescribed shares, their prescribed shares may be one of the following:

- One-fourth
- One-sixth
- One-fourth and one-sixth
- One-half

By adding the case that does not include an heir entitled to a prescribed share, they become five cases. When these five cases are multiplied by the thirteen cases mentioned above, the total cases are sixty-five.

As for the sixty-sixth case, it involves a paternal grandfather, siblings, and two heirs whose prescribed shares are one-half and one-sixth of the estate for each. An example of this case is the following:

- A paternal grandfather, one daughter, a son's daughter, one full sister, and one paternal half sister.

  As regards the sixty-seventh case, it involves prescribed heirs who inherit two-thirds of the estate along with the siblings and the paternal grandfather. This can be illustrated by the following example:

- A paternal grandfather, two daughters, one full sister and paternal half sister.

  As for the sixty-eighth case, namely the last one, it includes two prescribed heirs entitled to one-half and one-eighth of the estate, along with the siblings and the paternal grandfather, such as the following case:

- A paternal grandfather, one daughter, a wife, one full sister, and one paternal half sister.

Is there any possibility that the paternal half siblings get any share along with the full siblings in case of the *mu'âddah*?

If the full siblings include a male brother, or two or more full sisters, then there is no possibility that the paternal half siblings can get any share of the estate. However, if there is only one full sister, she gets her full share even if it reaches half the estate (as previously mentioned), and if there is something left, it goes to the paternal half siblings.

Among the cases in which there is something that may be left for the paternal half siblings are the four cases judged by Zayd Ibn Thâbit, so they are called the Four *Zaydî* Cases. They are as follows:

1- **The *'Ashriyyah* (i.e. using a common denominator of 10; decimal):** This case includes a paternal grandfather, one full sister, and one paternal half brother. Though these persons are entitled to take five shares of the estate, it is called *'Ashriyyah*, for a common denominator of 10 is considered in order to reach a natural numbers.

   The reason of considering a common denominator of 10: The full sister is entitled to take half the estate; however, there is no integer number resulting when dividing the number 5 (shares). In order to settle this issue, (2) is to be multiplied by 5 (the number of shares) that ends up as 10 shares. Thus, the paternal grandfather gets two-fifths (4 shares), the full sister gets half (5 shares), the paternal half brother gets the remaining one share. See the following table:

	5x2	10 shares
Paternal grandfather	2	4
Full sister	2½	5
Paternal half brother	½	1

2- **The *'Ishrîniyyah* (i.e. the case depending on using a common denominator 20):** This is when there are a paternal grandfather, one full sister and two paternal half sisters. So, the principle of division is 5 (the number of shares, bearing in mind that a male's share equals that of two females), similar to the above case. That is, the paternal grandfather gets two shares through the *muqâsamah*, and the full sister gets half the estate. However, there is no integer resulting from dividing five shares by 2 to give the full sister her prescribed half. Therefore, for easier calculations, is to be multiplied by 5 (the number of shares), which results in 10 shares. So, the paternal grandfather gets four shares (2 X 2 4), and the full sister gets half the estate, namely five shares. After that, there is one share left that goes to the two paternal half sisters and it is to be equally divided between them. However, there is no integer by dividing such remaining share, so 2 is to be multiplied by the 10 (the first common denominator in this case) that results in twenty (the new common denominator). In this way, the paternal grandfather's share is eight shares (4X2 8), and the full sister's share is ten shares (5X2 10). Then, the two paternal half sisters get the remaining two shares (2X1 2), i.e. one share for each. This can be illustrated in the following table:

	5X2	10X2	20 shares
Paternal grandfather	2	4	8
One full sister	2½	5	10
Two paternal half sisters	½	1	2 (1 for each)

Moreover, this issue can be settled by following another method. There are five shares: the paternal grandfather receives two through the *muqâsamah*, the full sister gets half the estate, namely (2½) shares. Thus, there is only a half share (1/2 share) remaining for the two paternal half sisters, so each of the two half sisters gets a fourth

share (1/4 share). In order to avoid fractions, 4 is multiplied by 5 (the number of shares) that results in 20 shares (i.e. using 20 as a common denominator). The paternal grandfather gets eight shares (2 X 4 8). The full sister gets half the estate, which equals 10 shares. The two paternal half sisters get two shares: one for each.

3- **The Abbreviated Case of Zayd:** This case includes a mother, a paternal grandfather, one full sister, one paternal half brother, and one paternal half sister. It is so called because the common denominator in this case is 108 according to the *muqâsamah*, and it can be abbreviated through dividing it by 2 that results in 54. For more illustration, the main number of shares is six, for the mother gets one-sixth of the estate, and the remaining five-sixths are divided among the paternal grandfather and the siblings through the *muqâsamah*. Therefore, there must be six shares according to their number (a male's share equals the share of two females); however, the remaining five-sixths cannot be divided by six. So, 6 (the common denominator) is to be multiplied by 6 (their number of shares) so the result is 36 shares. The mother gets one-sixth, namely equals 6 shares (6/36). The remaining shares are five-sixth of the estate, namely (30/36), of which the paternal grandfather gets ten shares (10/36) through the *muqâsamah*. The full sister gets half the estate that equals 18 shares (18/36). The remaining two shares (2/36) are to be divided among the paternal half brother and the paternal half sister. However, the two shares (2/36) cannot be divided by three (for the male gets double the share of the female), so 3 is to be multiplied by 36 (the common denominator) that results in 108 shares (as a new denominator). Thus, the mother takes 18 shares (6X3 18). The paternal grandfather gets 30 shares (10X3 30). The full sister takes 54 shares (18X3 54). The paternal half brother and paternal half sister get 6 shares (2X3 6); the brother gets 4 shares and the sister gets 2 shares (for the male gets double the share of the female).

After doing such a calculation, we find that both the shares and the common denominator (108) can be divided by 2, resulting in (54) as a new common denominator. Thus, the mother gets 9 shares, the full sister gets half the estate, namely 27 shares, the paternal grandfather gets 15 shares, the paternal half brother gets 2 shares and the paternal half sister one share. See the following table:

<table>
<tr><th></th><th>6X6</th><th>36X3</th><th>108 shares</th><th>54 shares</th></tr>
<tr><td>Mother</td><td>1</td><td>6</td><td>18</td><td>9</td></tr>
<tr><td>Paternal grandfather</td><td rowspan="4">5</td><td>10</td><td>30</td><td>15</td></tr>
<tr><td>Full sister</td><td>18</td><td>54</td><td>27</td></tr>
<tr><td>Paternal half brother</td><td rowspan="2">2</td><td>4</td><td>2</td></tr>
<tr><td>Paternal half sister</td><td>2</td><td>1</td></tr>
</table>

**4- The *Tis`iniyyah* of Zayd (i.e. the case depending on using a common denominator 90):** This case includes a mother, a paternal grandfather, one full sister, two paternal half brothers, and one paternal half sister. It is called *Tis`iniyyah* as the common denominator in such a case is ninety.

The reason for using the common denominator 90: One-third of the remainder of the estate, after giving one-sixth of the estate to the mother, is the best share for the paternal grandfather. That is, the common denominator between the one-third (of the remainder) and the one-sixth (entitled to the mother) is 18. Moreover, we can consider the common denominator 6 (to specify the one-sixth of the mother). After the mother gets one-sixth, the remaining five-sixths do not have a third as a natural number (i.e. integer). For easier calculations, we multiply 3 by 6 that results in 18 as a common denominator. The mother gets one-sixth that equals 3 shares (3/18). The paternal grandfather gets one-third of the remainder, i.e. 5 shares (5/18). The full sister gets half the estate, i.e. 9 shares (9/18). The remaining share cannot be divided among the paternal half siblings. Therefore, 5 (the number of siblings' shares as they are two males and a female) is to be multiplied by 18 (the common denominator) that results in 90 (the new common denominator):

- The mother gets 15 shares (3X5 15)
- The paternal grandfather gets 25 shares (5X5 25)
- The full sister gets 45 shares (9X5 45)
- The two paternal half siblings get 5 shares (1X5 5); each of the two brothers gets 2 shares and the sister gets the remaining one share. This can be illustrated through the two following tables:

<table>
<tr><th></th><th>18X5</th><th>90 shares</th></tr>
<tr><td>Mother</td><td>3</td><td>15</td></tr>
<tr><td>Paternal grandfather</td><td>5</td><td>25</td></tr>
<tr><td>Full sister</td><td>9</td><td>45</td></tr>
<tr><td>Two paternal half brothers</td><td rowspan="2">1</td><td>4 (2 for each)</td></tr>
<tr><td>One paternal half sister</td><td>1</td></tr>
</table>

<table>
<tr><th></th><th>6X3</th><th>18X5</th><th>90 shares</th></tr>
<tr><td>Mother</td><td>1</td><td>3</td><td>15</td></tr>
<tr><td>paternal grandfather</td><td rowspan="4">5</td><td>5</td><td>25</td></tr>
<tr><td>Full sister</td><td>9</td><td>45</td></tr>
<tr><td>Two paternal half brothers</td><td rowspan="2">1</td><td>4 (2 for each)</td></tr>
<tr><td>One paternal half sister</td><td>1</td></tr>
</table>

After elaborating on the issues and cases of inheritance, there is nothing left except what is related to the subject of "Inheritance Calculation". It involves of the topics of calculation, *munāsakhah*[3] and division of the estate, which are detailed in the books dedicated to tackling the prescribed shares of inheritance.

Endnotes

1 The *Mu'āddah*: Decreasing the paternal grandfather's share by the full siblings through the existence the paternal half siblings, and then blocking the paternal half siblings by the full siblings as the latter are worthier in inheritance.

2 See: *Al-'Adhb Al-Fā'id* (1/114).

3 *Munāsakhah* refers to the process of re-dividing the estate in case a legal heir dies before the division of the inheritance of the first deceased. In such a case, the inheritance is to be re-divided taking into consideration the death of that legal heir according to certain regulations.

CHAPTER

16

Dividing Prescribed Shares According to Assumption and Precautionary Procedures

As for all the issues of inheritance discussed above, they relate to certainty of the death of the inherited person and certainty of existence of the inheritors. Those issues do not involve any problematic issues as regards the division of the estate. But here we will shed light on some problematic issues in which neither the case of the inherited person nor the case of the inheritor is decided. That is, there may be uncertainty concerning the existence of some heirs, such as the case of the fetus, drowned persons, those who are killed under collapsed buildings, the missing persons, and the like. Moreover, such problematic issues may be related to the gender of the heirs; whether the heir is male or female, such as the case of the hermaphrodite and the fetus.

Owing to the uncertainty in such cases, there are special chapters dedicated for such issues in the study of inheritance entitled "The Chapters of Dividing Shares according to Assumption and Precautionary Procedures." They are as follows:

1-The doubtful hermaphrodite

2-The fetus

3-The missing person

4-The drowned and those killed under collapsed buildings

CHAPTER

17

Inheritance of a Hermaphrodite

According to the scholars of inheritance, the hermaphrodite is the person who has both the sexual organs of the male and the female, or the person who has not any at all.

A hermaphrodite heir can be related to the deceased as a descendant, a sibling, a father's sibling, or an emancipated slave. All such people can be either males or females. However, a hermaphrodite cannot be a father, a mother, a grandfather, or a grandmother, as the sex of each is already known. Further, it is unreasonable to say that a husband or a wife is a hermaphrodite, as it is impermissible to conclude the marriage of such a person as long as his gender is not decided.

Allah, Exalted be He, created humankind as males and females. Allah, Exalted be He, says:

> ***"O mankind, fear your Lord, who created you from one soul and created from it its mate and dispersed from both of them many men and women..."*** (Qur'ân: An-Nisâ': 1)

Allah, Exalted be He, also says:

> ***"To Allah belongs the dominion of the heavens and the earth; He creates what he wills. He gives to whom He wills female [children], and He gives to whom He wills males."***
>
> (Qur'ān: Ash-Shūrā: 49)

Needless to say, Allah has shown and explained the rulings pertaining to each gender and He did not state the case of the hermaphrodite. This means that a person cannot be called a male and a female at the same time, as there is discrepancy between the features of each gender. In order to distinguish between the two sexes, Allah, Exalted be He, set distinctive features; however, some dubiousness and confusion might happen due to the existence of both the male and female sex organs.

Muslim scholars unanimously agree that hermaphrodites inherit according to the most predominant features they have of the two sexes. For example, a hermaphrodite who urinates from the male organ is to inherit the share of a male, and the one who urinates from the female organ is to inherit the share of a female. This is because, the sign of urinating is amongst the most common and indicative signs designating one's sex, as it is a natural sign, whether one is a child or an adult. So, whoever urinates from the male organ is considered a male and vice versa, and, in such a case, the other organ is considered an additional one that goes back to a natural defect. In this respect, if a hermaphrodite person urinates from both the male and female organs, the matter is decided according to the organ from which such a person urinates much. But if such a person begins urinating from one of the two organs, then starts to urinate from them both, the matter is decided according to the first organ urinated from. In this regard, if a hermaphrodite child starts urinating from both male and female organs at the same time and with similar quantity, it is not to be decided until such a person reaches puberty, so as to be able to decide then what the child's actual sex is. Thus, such a person's case continues to be problematic until the age of puberty, as it is expected to be decided at that time.

As for the signs that appear at the age of puberty, they are of two kinds: some relate to men and others relate to women. With regard to the first kind, namely, the signs that relate to men, they involve the growth of the hair of the moustache and beard, and ejaculation. So, if any of these signs appears, that person is a male. As regards the second kind, namely, the signs that relate to women, they involve menstruating, pregnancy and growing of breasts. Thus, if

any of such signs appear, that person is a female. However, if the signs of being a male or a female do not appear at the age of puberty, such a person's case is still considered problematic and the situation is not expected to be decided. In such cases, it is for the Muslim scholars to decide the way according to which such a person inherits. There are different opinions of scholars concerning the inheritance of hermaphrodites and those involved with them in cases of inheritance. These opinions are as follows:

A group of scholars view that the hermaphrodite is to be given the smaller share (whether he gets it as a male or a female); yet, they say that this does not apply to the rest of inheritors. Therefore, if a hermaphrodite is considered to be a male, then he receives the least possible share for him as a male. However, if a hermaphrodite is considered to be a female, then she gets her share. Moreover, if the hermaphrodite is not entitled to any share in the deceased's estate in one of the two cases (being a male or a female), then such a person is not to get any share.

Some scholars view that the hermaphrodite as well as other heirs are to get the smallest possible shares they may receive, and the remaining portion is to be reserved until the situation of such a person is decided, whether a male or a female, or that the heirs reach an agreement concerning the division of the remaining portion.

Some other scholars view that the hermaphrodite is to be given half the share of a male and half the share of a female, if such a person is to inherit according to both possibilities. However, if the hermaphrodite is to inherit according to only one possibility (e.g., being a male only), such a person is given half the share entitled to such a possibility. This is the applicable ruling whether it is expected that the actual sex of such a person be decided or not.

Another group of scholars maintains that there must be distinction between the two cases, i.e. whether the actual sex of the hermaphrodite is expected be known or not. That is, if the sex of a hermaphrodite is expected to be known, such a person and other heirs get the least possible shares they may deserve. So, the hermaphrodite and other heirs are to receive the specified shares of the inheritance, and the remainder is not to be distributed until the sex of the hermaphrodite is known. However, the hermaphrodite is to be given half the share of a male and half the share of a female if such a person is to inherit according to both possibilities. But if the hermaphrodite is to inherit according to only one possibility (e.g., being a male only), such a person is given half the share entitled to such a possibility. And Allah, Exalted be He, knows best.

CHAPTER

18

Inheritance of a Fetus

In some cases, the legal heirs may include a fetus. In fact, some problems may arise as regards the fetus's life or death, being a male or a female, one or more, etc. Thus, the ruling in such cases differs according to each possibility. Hence, Muslim scholars (may Allah have mercy on them) pay great attention to the case of the fetus, as they dedicate a whole chapter for it in their books of inheritance.

Here, the issue that concerns us is the case of a deceased leaving behind a pregnant woman, whether the fetus is entitled to inherit (when delivered alive) or that his/her share is eliminated (i.e. blocked) in all cases, or that such a fetus is entitled to inherit in some cases and blocked in others.

As for the fetus that is uniformly agreed upon his/her right in inheritance, there should be two conditions:

First: Making sure of the existence of the fetus in the womb of a woman at the time of the inherited person's death, even if it is just drops of male and female sexual discharge.

Second: The fetus is delivered alive and in a stable condition. This is due to the *hadith* of the Prophet (PBUH) in which he says:

"If a newborn cries (or shows any other signs indicating life), then it is to get a share of inheritance."[1]

(Related by Abû Dâwûd, and it is reported that Ibn Hibbân graded it as a *sahîh* (authentic) *hadîth*)

The signs of life, concerning the newborn child, involve crying, sneezing, moving or any other signs indicating life, and it is not restricted to crying. Hence, the presence of signs of life indicates the stable condition of the newborn and thus the second condition is fulfilled

As for the first condition, namely the existence of a fetus in the womb of a woman at the time of the inherited person's death, it can be verified by being born within the specified period of pregnancy; the maximum and the minimum period of pregnancy. As regards the period of pregnancy, there are three possible cases as follows:

The first case: This is when a woman delivers a newborn alive before the minimum period of pregnancy passes; in this case, the new born gets its share in the estate as scholars unanimously agree. Thus, when the woman delivers that newborn for a period less than six months after the death of the inherited person, this indicates that she was actually pregnant during the lifetime of the inherited person. According to the consensus of Muslim scholars, the minimum period of pregnancy is six months. This is due to the statement of Allah, Exalted be He, in which He says:

"...and his gestation and weaning [period] is thirty months..."
(Qur'ân: Al-Ahqâf: 15)

Allah, Exalted be He, also says:

"Mothers may nurse [i.e. breastfeed] their children two complete years..." (Qur'ân: Al-Baqarah: 233)

So, if the period of breastfeeding, twenty-four months, is subtracted from thirty months, the remaining is six months which is the minimum period of pregnancy.

The second case: This is when the fetus is born after the maximum period of pregnancy passes after the death of the inherited person. In such a case, the newborn does not have any right in the estate.

This is because the delivery of the child after the maximum period of pregnancy indicates that pregnancy has happened after the death of the inherited person.

Scholars differ with regard to determining the maximum period of pregnancy. There are three opinions:

1. The maximum period of pregnancy is two years. This is due to the statement of the Mother of the Believers, `Â'ishah (may Allah be pleased with her), who said:

   "The fetus does not stay in the womb of the mother for more than two years."[2]

   There is no room for *ijtihâd* regarding this statement, as it is dealt with as a *marfû`* (traceable) *hadîth*.

2. The maximum period of pregnancy is four years. This is because when there is no legal text, we must resort to the actual cases, and some cases of pregnancy have been reported to last for about four years.

3. The maximum period of pregnancy is five years.

The preponderant of those opinions – Allah knows best – is that the maximum period of pregnancy is four years. This is based on the fact that there is no decisive proof indicating such period, so we should consider the actual cases, and it truly happened that some cases of pregnancy lasted for four years; and Allah knows best.

The third case: This is when the newborn is delivered after a period more than the minimum period of pregnancy and less than the maximum period of pregnancy. In such a case, if such a woman has a husband or a master (i.e., if she is a slave girl) who copulates with her during that period, the born child does not have any right in inheritance. This is because, there is no evidence that pregnancy happened during the lifetime of the inherited person; pregnancy might have happened due to copulation that took place after the death of the inherited person. However, if that woman does not have a husband or a master or that they are absent during that period, or that they cannot copulate with her due to impotency or for any other reason, then the newborn is entitled to inherit, as there is a proof indicating its existence during the lifetime of the inherited person.

In this regard, Muslim scholars unanimously agree that when the newborn cries, then there is a certainty that it is born alive and is in a stable condition. However, they differ as regards those signs indicating life other than crying, such as moving, suckling or breathing. Some scholars view that the sign of the newborn's life is restricted to crying, excluding any of the other accompanying signs. Other scholars consider the sign of crying as well as any other signs indicating life. The latter is the preponderant opinion, as the sign of life is not restricted to crying, but it includes other signs, such as moving and the like, as viewed by some scholars. Even if the sign of life refers to just crying or making any voice, this does not mean that we should exclude any other signs indicating life; and Allah knows best.

How to Give the Fetus Its Share

If there is a fetus among the legal heirs, they should wait until its birth to know whether the newborn will be entitled to any share in the estate or not, so that the estate is distributed at once. But if the heirs do not agree to wait until the baby is delivered and demand the distribution of the estate before its birth, is that permissible for them? Muslim scholars have two different opinions with regard to this issue:

The first opinion: The heirs are not permitted to distribute the estate. This is due to the uncertainty concerning the case of the fetus, as there are many possibilities, such as the number of fetuses. Such a matter may cause a great difference in the fetus's share as well as the shares of other heirs.

The second opinion: It is permissible for the heirs to distribute the estate before the child is born and they are not obligated to wait, as it may cause harm to them. This is because some of the heirs may be needy and the period of pregnancy might be long. Thus, according to this opinion, the share of the fetus is to be considered so that there is a guarantee that the newborn gets its due share. So, there is no need for delaying the distribution of the estate.

According to the apparent circumstances, the second opinion is the preponderant one. Yet, the scholars adopting the second opinion differ as regards the amount (share) that should be left for the fetus. This is because no one can know the actual case of the fetus except Allah. Besides, the case of the fetus involves so many possibilities: being alive or dead, one or more, a male or female, etc. Undoubtedly, those several possibilities have their effect

on the share of the fetus as well as the shares of those involved with him in the inheritance. Therefore, scholars differ concerning the amount that should be left for the fetus. There are three opinions with regard to this issue:

First: There is no criterion regarding the number of fetuses a woman may carry. Here, the criterion is the cases of the other heirs who inherit along with the fetus. That is, if a person inherits only in some cases or his/her share is unspecified, such as the case of the agnate relatives, such a person is not to be given anything. As for the heir who inherits in all cases and whose amount of share may differ, such a person is to be given the least share he/she may get. With regard to the heir whose share does not differ in amount in all cases, he/she is to be given his/her full share. After doing so, the remainder of the estate is reserved until the case of the fetus is decided.

Second: The fetus is to be treated according to what is best for it (i.e. the possibility according to which the fetus may get the largest possible share) and those inheriting along with it are to receive their least possible shares. Thus, the bigger share of that of two males or that of two females is to be reserved for the fetus, and the other heirs who have specified shares are to receive the least of the shares they deserve. Therefore, after the child is born and the case is decided (concerning sex and number, etc.), there are three procedures to be followed:

1- The newborn gets its due share from the reserved amount, and what remains is to be redistributed among the heirs.

2- The newborn gets all the reserved amount if it equals its share.

3- The newborn completes its due share from the shares of the other inheritors if the reserved amount is less than its due share.

Third: A share equal to the share of one male or one female, the larger of which is to be reserved for the fetus. The reason behind this is that it happens in most cases that a woman delivers only one baby each time. Hence, the ruling should be established on what happens most often. According to this opinion, the judge is to assign a sponsor, from among the heirs, to guarantee that the newborn babies will get their full shares (if they are more than one). This is because a newborn cannot ask for its rightful share, so the judge does this on the child's behalf as a precautionary procedure.

Finally, the soundest of the three aforementioned opinions is that which involves more precaution, namely the second one. That is, it happens many times that women give birth to twins, but delivering more than two babies rarely occurs. Besides, assigning a sponsor, as mentioned in the third opinion, may be difficult; even if it is done, some matters may happen and prevent such sponsor from observing the assigned mission. Thus, the newborn children may not receive their due shares if they turned out to be more than one child, so their rights may be lost.

According to the soundest opinion, there are six possibilities for the fetus:

1) The child may be delivered dead
2) It may be only one male
3) It may be only one female
4) It may be one male and one female
5) It may be two males
6) It may be two females

These are six possibilities, for each is a specific case as regards the distribution of the estate. Besides, the distribution of the estate is to be according to a mathematical process for each possibility. The cases of the heirs are to be considered. As for the heir who gets the same share in all cases, he/she is to get his/her full share. However, those heirs whose shares may differ in amount from a case to another are to receive the least of their shares. With regard to those who inherit in some cases and are blocked in others, they get nothing of the estate. After that, the remainder of the estate is to be reserved until the fetus is delivered and its case is decided as mentioned above; and Allah knows best.

Endnotes

1 Abû Dâwûd (2920) [3/225]; see also Ibn Mâjah (1508) [2/222].
2 Ad-Dâraqutnî (3829) [3221] and Al-Bayhaqî (15552) [7/728].

CHAPTER

19

Inheritance of a Missing Person

The missing person means the one whose state is not defined and it is not known whether alive or dead. This may be due to traveling, participating in a battle, being shipwrecked, or being captured by enemies, etc.

Since the missing person's state is not determined as to whether being existent or not, each case of the two has its own ruling. Some of these rulings pertain to:

- His wife
- His inheritance from others
- Being inherited by others
- Being an effective heir on the shares of other heirs

As neither of the two possibilities (being alive or dead) is considered more probable than the other, there must be a designated period until the real state of the missing person is verified, providing a chance to look for him. If that period elapses with nothing known about such a person, this will be evidence that he is no longer alive. In view of this, scholars unanimously have agreed to designate such a period; yet, there is disagreement regarding how long it should be according to two opinions:

First opinion: The criterion is the estimation of the judge regarding this period. This is because the original rule is that the missing person is alive and this is not to be overlooked except with a decisive proof or the like. This opinion is unanimously adopted by the majority of Muslim scholars, whether such a missing person is expected to be safe or deceased, and whether he has been lost before or after the age of ninety. Thus, a missing person is to be expected to come back until there is a proof that he has died, or that a period ends after which it becomes certain that he has died.

Second opinion: This opinion adopts an elaborated view which implies that the missing person has two cases:

1- If the missing person is most likely to be deceased, it is imperative to wait for four years since he was last seen. To elaborate, persons such as those who go missing in a peril, while fighting, or in ship wreckage of which some passengers were safe while others drowned, and persons who are lost within the locality – for example, going out for prayer and never came back – are to be expected back for a four-year period since they were last seen. If no news about a missing person is heard throughout this period, he is surely deemed to be dead.

2- If the missing person is most likely to be safe and sound (e.g., those who travel for trade, tourism or learning, and nothing is heard about them), it is imperative to wait until such a person reaches ninety since his birth, until it is not likely for him to be living any more, before declaring his death.

The first opinion, referring to the estimation of the judge in deciding the period to wait for a missing person to come back before declaring his death, is the preponderant, for such a period varies according to time, states and persons. This is because communications and transport means have made the whole world much closer, quite unlike the past.

If the Person from whom the Missing one Inherits Dies within the Said Designated Waiting Period

If the inherited person has no other heirs except the missing person, all his estate is to be withheld, until it is clear (whether the missing person is alive or dead), or the designated waiting period is over.

Scholars maintain different views concerning the issue of the inherited person who has heirs other than the missing person. The soundest view is the opinion of the majority of scholars: that is the heirs who co-inherit with the missing person are given the least possible shares. Thus, each heir is to be given his/her least amount while the remainder is to be withheld. Hence, the estate is to be divided as if the missing person is alive, then as dead. The heir who is entitled to a bigger share in one of the two cases (i.e. the missing person's being alive or dead) is to be given the least share; the heir is entitled to an equal share in both cases will be given his/her share in full; and the heir who inherits only in one of the two cases will be given nothing. The remainder of the estate will be withheld until the missing person's state is verified.

If the Missing Person is Deemed Dead

The missing person is deemed dead if the designated waiting period has passed with no evidence disclosing his status. Thus, his own estate and share (which he/she has inherited, as mentioned in the previous case) are to be divided among his heirs who are still alive, excluding those who died during the designated waiting period. That is because his death was determined later after the death of his heirs who are not then entitled to inherit.

CHAPTER 20

Inheritance of the Drowned and Those Killed Under Collapsed Buildings

The issue of mass deaths, in which many people die and some of them are legal heirs of others, is a problematic issue that causes great confusion. This is because it is difficult to realize who has died first to be considered an inheritor and who has died later to be considered an heir. Nowadays, mass deaths frequently happen as a result of road accidents, such as car and train accidents, and plane crashes. Mass deaths can also be a result of building collapse, accidental fire, drowning, bombardment, etc. With this in mind, the issues involved in the inheritance of those deceased people, who legally inherit from one another, are summarized in five cases:

- **When all the deceased persons are known to have died at the same time:** In this case, scholars unanimously maintain that there is no inheritance,

as inheritance is based upon verifying that the heir is alive after the death of the inherited person, which is not available in such a case.

- **When some of them are still known to have died before some others:** In such a case, scholars unanimously view that those who have died later are entitled to inherit from those who have died earlier, since it is verified that the heir has temporarily survived the inherited person.
- When some of them are known to have died before some others without determining who have died first.
- When some of them are known to have died before some others yet that is forgotten.
- When the sequence of their deaths is unverified and it is not recognized if they all have died at the same time or at different times.

In these last three cases, there is a great room for probability, *ijtihâd* (legal reasoning and discretion) and speculation among scholars (may Allah have mercy on them) who entertained two different opinions:

The first opinion: entails that there is no inheritance between those deceased people in all these three cases. This view is supported by the opinion of a group of the Prophet's Companions, including Abû Bakr As-Siddîq, Zayd Ibn Thâbit and `Abdullâh Ibn `Abbâs (may Allah be pleased with them all). The three Imâms Abû Hanîfah, Mâlik and Ash-Shâfi`î (may Allah have mercy on them) said the same, and it is one of the opinions adopted in the school of Imâm Ahmad. This is based on the fact that one of the conditions to inherit is the certainty that the heir is alive after the death of the inherited person, which is not only unfulfilled here, but also doubted, and the rule of thumb is that there is no inheritance with doubt. Moreover, those who died in the Battles of Al-Yamâmah, Siffîn and Al-Harrah, did not inherit from one another.

The second opinion: entails that each of them inherits from the other, following the opinion of a group of the Companions (may Allah be pleased with them) including `Umar Ibnul-Khattâb and `Alî Ibn Abû Tâlib (may Allah be pleased with them), which is the opinion acted upon in the Hanbalî School. The underlying assumption behind this view is that each one of them has certainly been alive and must have lasted until after the death of the other. To illustrate, when `Umar (may Allah be pleased with him) was informed of the plague that afflicted

> Ash-Shâm[1] and that whole families died as a result, he ordered that the estates of the dead persons would be estimated according to the shares they were to receive from one another, and then the living heirs would inherit from the dead persons[2].

It is stipulated that the living heirs of the dead persons do not differ with regard to the precedence of one to another in the order of death. When every heir claims that his inherited person has died later, with no evidence, then they have to take oaths and no inheritance is to take place. According to this opinion, every heir (among the dead persons) inherits from the original estate of the other dead heir excluding the new estate. To elaborate, if an heir is assumed to have died earlier than another, the share the latter gets from the former is to be distributed among latter's live heirs only, i.e. we exclude the former from whom the latter has inherited, and we reverse the assumption, and apply the same way of distribution.

The first view, indicating that they do not inherit from one another as no inheritance is to be made with doubt, is the preponderant one. This is because the actual status of the deceased ones (the heirs) is unknown, and what is unknown is deemed non-existent. Moreover, the precedence of the death of one another is unknown, so it is insignificant in this case. Besides, it is not reasonable to have deceased heirs inherit from one another, as inheritance is made to let the heir make use of the inherited property, which is not the case here. Also, making the deceased persons inherit one another is a contradictory view. This is because giving a deceased heir from the estate of another indicates that the former has survived the latter, and then giving the latter from the estate of the former indicates the opposite; this implies that each of them has died before the other, which is not logical. With this in mind, the preponderant view is that only live heirs inherit the estate of the deceased ones, in order to adhere to what is certain and keep away from doubtful matters; and Allah knows best.

Endnotes

1 Ash-Shâm: The Levant; the region covering Syria, Lebanon, Jordan, and Palestine.
2 Ibn Abû Shaybah (31337) [6/279].

CHAPTER

21

Inheritance by *Radd*

According to scholars of inheritance, the *radd* means giving the remainder of the estate (after the prescribed shares are divided) to the legal heirs entitled to prescribed shares, in case there is no agnate relative(s) entitled to get the remainder. Allah, Exalted be He, stated the prescribed shares as half, one-fourth, one-eighth, two-thirds, one-third, and one-sixth, and explained how the agnate males and females inherit. The Prophet (PBUH) also said:

> *"Give the shares of the inheritance (prescribed in the Qur'ān) to those who are entitled to receive them. Then whatever remains should be given to the closest male relative of the deceased."*[1]

This noble *hadith* clarifies the text of the Glorious Qur'ān and puts the heirs of both types in the right order: Those entitled to receive prescribed shares then the agnate relatives. According to this *hadith*, whenever both types are involved in a case of inheritance, those entitled to prescribed shares are to be given their due shares first, and then the remainder, if any, is to be given to the agnate relatives. If there are agnate relatives only, they are to be given the whole estate divided according to their share.

The problem arises when there are persons entitled to prescribed shares whose shares of the estate are less than the amount of the estate, and there are no agnate relatives to get the remainder. In such a case, the remainder will be redistributed among those entitled to prescribed shares in proportion to their prescribed shares, except the two spouses, according to the following proofs:

First: Allah, Exalted be He, says:

> ***"...But kindred by blood are nearer to one another regarding inheritance in the decree ordained by Allah..."***
>
> (Qur'ân: Al-Anfâl: 75)

Those entitled to the prescribed shares are the deceased's blood relatives, so they are more entitled to the deceased's estate than anyone else.

Second: The Prophet (PBUH) says:

"If anyone leaves a property, it goes to his heirs."

(Related by Al-Bukhâri and Muslim)[2]

This ruling is general in all types of estate left by the deceased, including what is left over (the remainder) after distributing the prescribed shares. Thus, one's legal heirs, who are entitled to prescribed shares, are more entitled to one's estate than anyone else.

Third: Sa`d Ibn Abû Waqqâs (may Allah be pleased with him), narrated that he said to the Prophet (PBUH) while he was visiting him because he was ill:

"O Messenger of Allah! I have no heirs except my only daughter."[3]

The Prophet (PBUH) did not deny restricting the inheritance to the daughter. If it were impermissible, it would not be approved by the Prophet (PBUH). This denotes that the one entitled to a prescribed share gets the remainder of the estate if there are no other agnate relatives; and this is what is meant by the *radd*.

The *radd* is applicable with regard to the persons entitled to receive prescribed shares except the two spouses, for they may not have a common blood relationship. Thus, the husband and the wife are not included in the general denotation of the following verse:

> ***"...But kindred by blood are nearer to one another regarding inheritance in the decree ordained by Allah..."***
>
> (Qur'ân: Al-Anfâl: 75)

Scholars have unanimously agreed that the two spouses are not among those who are to be given the excess of estate. Yet, it was reported that 'Uthmân Ibn 'Affân (may Allah be pleased with him) once judged that the remainder of the estate is to be given a husband. Scholars view that 'Uthmân's judgment may have been due to a reason other than the *radd*, such as being an agnate relative or having a blood relationship with his wife; and Allah knows best.

Endnotes

1 Al-Bukhâri (6732) [12/14] and Muslim (4117) [6/54].
2 Al-Bukhâri (6731) [12/13] and Muslim (4133) [6/61]
3 Al-Bukhâri (1295) [36/210] and Muslim (4145) [6/79]

CHAPTER

22

Inheritance of Kindred by Blood

According to scholars of inheritance, kindred by blood are the relatives who are not entitled to have prescribed shares nor are they from one's agnate relatives. They are of four types:

First: Those who belong to the deceased, namely daughters' children and the children of the sons' daughters and so forth in a descending lineage.

Second: Those to whom the deceased belongs, namely the non-inheriting grandfathers and grandmothers,[1] and so forth in an ascending lineage.

Third: Those who belong to the parents of the deceased, namely the sisters' children, the brothers' daughters, the children of maternal half brothers, and whoever is related to the deceased through them, and so froth in a descending lineage.

Fourth: Those who belong to grandfathers and grandmothers of the deceased, namely the deceased's father's maternal half brothers, all paternal aunts, all female paternal cousins, all maternal uncles, and all maternal aunts, no matter far they (all these relatives) are, and their children however low in a descending lineage.

These are the types of kindred by blood in general. They are to inherit if there is none entitled to inherit prescribed shares except the husband and the wife, provided there are no agnate relatives. This is according to the following evidences:

First: Allah, Exalted be He, says:

"...But kindred by blood are nearer to one another regarding inheritance in the decree ordained by Allah..."

(Qur'ân: Al-Anfâl: 75)

This means that blood relatives are entitled to inherit each others according to the Judgment of Allah.

Second: The general implication of the following Qur'anic verse:

"For men is a share of what the parents and close relatives leave, and for women is a share of what the parents and close relatives leave, be it little or much – an obligatory share."

(Qur'ân: An-Nisâ': 7)

The words 'men', 'women', and 'close relatives' include one's kindred by blood. Thus, whoever claims that the verse refers to a certain case should prove his claim.

Third: The Prophet (PBUH) said:

"The maternal uncle is the heir of him who has none."

(Related by Ahmad, Abû Dâwûd, Ibn Mâjah, and At-Tirmidhî who deemed it *hasan*)[2]

This *hadîth* signifies that the maternal uncle becomes a legal heir when there is none entitled to a prescribed share or agnate relatives. As the maternal uncle is from one's kindred by blood, then the same rule can be applied to other relatives from one's kindred.

These are some proofs supporting the view that one's kindred by blood may inherit. This view is reported about some of the Prophet's Companions

including 'Umar Ibnul-Khattâb and 'Alî Ibn Abû Tâlib (may Allah be pleased with them). This opinion is adopted by the Hanbalî and Hanafî scholars, and it is one of the two views adopted by the Shâfi'î School in case the affairs of the Public Treasury are not settled or it is not established as a unique institution.

The scholars who view that the kindred by blood are to inherit differ regarding the way they receive their share of inheritance, and they have some views the commonest of which are the following two:

First view: They (kindred by blood) are entitled to inherit by considering every one of them in the place of the one to whom he/she is related to the deceased, i.e. to be given such a person's share. Thus, daughters' children and the children of the sons' daughters are to be treated like their mothers. Likewise, the deceased's father's maternal half brothers and also paternal aunts are to be treated like the father. Similarly, the maternal uncles, maternal aunts and maternal grandfathers are to be treated like the deceased's mother. Moreover, brothers' daughters and the daughters of the brothers' sons are to be treated like their fathers and so on.

Second view: The kindred by blood are to inherit the same as the agnate relatives do, i.e. the closer the relative is, the more he/she is entitled to inherit; and Allah knows best.

Endnotes

1 Those non-inheriting grandfathers and grandmothers are previously mentioned in detail.

2 Abû-Dâwûd (2899) [3/215] and Ibn Mâjah (2634) [3/271]; see also At-Tirmidhî (2108) [4/421] and (2109) [4/422].

CHAPTER

23

Inheritance of Divorced Women

Verily, Allah, Exalted be He, made the marriage contract a cause for inheritance. Allah, Almighty and Ever-Majestic be He, says:

> ***"And for you is half of what your wives leave if they have no child. But if they have a child, for you is one fourth of what they leave, after any bequest they [may have] made or debt. And for them [i.e. the wives] is one fourth if you leave no child. But if you leave a child, then for them is an eighth of what you leave, after any bequest you [may have] made or debt..."*** (Qur'ān; An-Nisā': 12)

In consideration to this, the two spouses inherit from each other as long as the marriage contract has been valid until the death of the inherited spouse, unless there is a cause that prevents one of them from inheriting from the other. However, no inheritance is to take place in case of the irrevocable divorce, for the rule of thumb states that if there is no cause, there is no effect. However, there might be some conditions in which divorce does not prevent

the two spouses from inheriting one another. To illustrate, the two spouses inherit from one another in case of the revocable divorce as long as the wife is still in the waiting period. Muslim scholars have singled out a specific section for "The Inheritance of Divorced Woman". Regarding this, divorced women are of three types:

First type: A revocably-divorced woman, no matter the divorce has occurred while the husband is in good health or not.

Second type: A woman irrevocably divorced while her husband is in good health.

Third type: A woman irrevocably divorced while her husband is in his last illness.

Concerning the legal ruling of each of the above cases, the revocably divorced woman is unanimously agreed to be entitled to inherit once her husband dies as long as she is still in her waiting period. This is because she is still regarded as a wife and she is entitled to all the rights a wife has.

It is also unanimously agreed by scholars that the irrevocably divorced woman, while her husband is in a good health or suffers from a curable disease (i.e. is not seriously ill) and not being suspected to have disinherited his wife (i.e. by divorcing her), is not entitled to inherit from her husband, for she is no longer related to him.

Likewise, the irrevocably divorced woman, whose husband is incurably ill and he is not suspected to have disinherited his wife (i.e. by divorcing her), is not entitled to inherit from him.

In contrast to the previous case, the irrevocably divorced woman while her husband is in his last illness, is entitled to inherit from him during the waiting period and after it ends, provided that the husband is suspected to have intentionally disinherited her (by divorcing her) and that she has neither remarried nor apostatized after the divorce. This view is asserted by the incident when Caliph 'Uthmân (may Allah be pleased with him) judged that the wife of 'Abdur-Rahmân Ibn 'Awf (may Allah be pleased with him), whom he irrevocably divorced in his last illness to disinherit her, had the right to inherit from him (i.e. 'Abdur-Rahmân Ibn 'Awf).[1] This judgment, which is not restricted to the waiting period, was known among the Prophet's Companions and none disapproved of it, despite rule of the avoidance of disputes and sins. This is because such an ill-intentioned husband is treated according to his bad intent (i.e. his intentional divorce of his wife in his last illness to disinherit her); and Allah knows best.

Moreover, the two spouses inherit from each other by virtue of the marriage contract if either of them dies before the consummation of the marriage or meeting in privacy due to the generality of the verse:

> ***"And for you is half of what your wives leave if they have no child. But if they have a child, for you is one fourth of what they leave, after any bequest they [may have] made or debt. And for them [i.e. the wives] is one fourth..."*** (Qur'ān: An-Nisā': 12)

This is because the matrimonial relationship is an intimate and noble one upon which great rulings and interests are entailed. Therefore, Allah, Exalted be He, prescribed for both spouses some share of the estate of one another when the other dies, as Allah did for the relatives. This ensures that both spouses should respect and venerate one another.

These are the blessing and gracious rulings of Islam to which we supplicate Allah to keep us strictly adhering and embracing it forever.

Endnotes

1 Ad-Dāraquṭni (4005) [4/35] and (4007) [4/36]; see also Ibn Abū Shaybah (19026) [4/176].

CHAPTER

24

Inheritance among People of Different Religions

By referring to difference in religion, we mean that the inherited person embraces a religion different from that of the heir. This topic includes two issues:

First: When a Disbeliever Inherits from a Muslim and Vice Versa

Muslim scholars have entertained four different opinions with regard to this issue:

First opinion: The majority of scholars state that a Muslim never inherits from a disbeliever nor does a disbeliever inherit from a Muslim. This is because the Prophet (PBUH) says:

"A Muslim cannot be the heir of a disbeliever, nor can a disbeliever be the heir of a Muslim."
(Related by Al-Bukhâri and Muslim)[1]

Second opinion: The Muslim one never inherits from the disbeliever and vice versa, except through the *walâ'*[2] according to the *hadîth* that reads:

"A Muslim cannot be the heir of a Christian except when he (the Christian person) is his (the Muslim's) slave or his slave-girl."

(Related by Ad-Dâraqutnî)[3]

This *hadîth* signifies that the Muslim heir inherits from his Christian manumitted slave and vice versa according to analogical deduction.

Third opinion: The disbeliever inherits from his Muslim relative if the former converts to Islam before the estate of the Muslim deceased is divided. This is according to the *hadîth*:

"An estate which was divided in the Pre-Islamic Period of Ignorance (the Jâhiliyyah) may follow the division in force then, but any estate in Islamic times must follow the division laid down by Islam."[4]

The *hadîth* signifies that a disbeliever is entitled to inherit from a Muslim if the former converts to Islam before the estate of the Muslim deceased is divided.

Fourth opinion: The Muslim inherits from the disbeliever and not vice versa due to the *hadîth*:

"Islam increases and never decreases."[5]

This is because when the Muslim inherits from the disbeliever that is considered an increase, and not vice versa. The *hadîth* signifies that Islam leads to increase not to decrease.

The preponderate view – and Allah knows best – is the first one, (i.e. the Muslim never inherits from the disbeliever and vice versa) due to its sound and explicit proof unlike those of the other views, which are either weak or inexplicit proofs.

Second: Inheritance among Disbelievers

As far as inheritance is concerned, disbelievers are divided into two states:

First state: It is indisputable that disbelievers of the same religion inherit from one another (e.g. a Jew from another Jew and a Christian from a Christian).

Second state: Scholars maintain three different views concerning disbelievers of various religions (e.g. Jews, Christians, magi, or pagans) whether they inherit from one another or not in regard to determining whether disbelief involves one or several religions.

First view: The Hanafi and Shafi'i schools maintain that disbelief involves one religion (i.e. all disbelievers are of the same state). This is also one of the opinions adopted in the Hanbali School. Moreover, this is the opinion of the majority of scholars that disbelief, including all its creeds, is regarded as one religion. Thus, disbelievers inherit from one another regardless of difference in religion. This is because the legal texts with regard are general, so they are not to be restricted unless by the Lawgiver. To illustrate, Allah, Exalted be He, says:

"And those who disbelieved are allies of one another..."

(Qur'ân: Al-Anfâl: 73)

Second view: Disbelief comprises three religions: Judaism, Christianity, and the other types as one religion, as they have no Sacred Book. Thus, a Jew is not to inherit from a Christian and both of them are not to inherit from a pagan, and so on.

Third view: Disbelief comprises several creeds; people of each are not to inherit from those of others. To illustrate, the Prophet (PBUH) says:

"People of two different religions cannot inherit from one another."

(Related by Ahmad, Abû Dâwûd, An-Nasâ'î and Ibn Mâjah)[*]

According to the aforementioned *hadîth*, the third view seems to be the preponderant one. That is, people of different religions, e.g. Muslims and disbelievers, are not to inherit from one another due to the lack of mutual support among them, and also because the cause for inheritance in this case contradicts the cause impeding inheritance. In other words, difference in religion entails conflict in all other matters, and this leads to the disinheritance from one another.

The scholars who view that disbelief involves one religion consider that the difference of location (i.e. living in two different states) is a disinheriting factor due to the lack of mutual support among them, which is applicable when there is difference in religion. Thus, it seems more appropriate that people of different religions, a Christian and his Jewish relative for example, cannot inherit from one another. However, disbelievers of the same religion can inherit from one another; and Allah knows best.

Endnotes

1 Al-Bukhârî (6764) [12/61] and Muslim (4116) [6/53].
2 *Walâ'*: The freed slave's loyalty by virtue of emancipation.
3 Ad-Dâraquṭnî (4036) [4/41].
4 Abû-Dâwûd (2914) [3/222] and Ibn Mâjah (2485) [3/221].
5 Al-Bayhaqî (12153) [6/338].
6 Abû-Dâwûd (2911) [3/221], Ibn-Mâjah (2731) [3/322] and At-Tirmidhî (2113) [4/424].

CHAPTER

25

Inheritance of the Murderer of the Inherited Person

Causes of inheritance may exist, yet an entitled heir may not be given his/her prescribed share. There are many causes that prevent one from receiving one's share of estate. One of these causes is the case of an heir who murders the inherited person. To illustrate, the Prophet (PBUH) says:

> *"No (share of the) inheritance (of the murdered person) is to be given to the murderer."*[1]

The Prophet (PBUH) also says:

> *"A murderer is not to inherit anything (from the inheritance of the person he killed."*

This mainly aims at blocking means to committing what is prohibited, as love for wealth may drive an heir to murder whom he may inherit. The well-known rule states, **"Whoever hastens to possess something before its due time will be punished by not having it."**

Scholars, unanimously agree that the murderer of the inherited person is to be disinherited. Yet, they maintain different views with regard to the type of murder that prevents one from inheritance.

According to **Imâm Ash-Shâfi'î** (may Allah have mercy on him) the murderer never inherits anything, no matter what type of murder it is. That is due to the generality of the *hadith* of the Prophet (PBUH) in which he says:

> *"A murderer is not to inherit anything (from the inheritance of the person he killed)."*[2]

This signifies that the murderer is not entitled to inherit from his victim in order not to let killing be a means to hasten obtaining inheritance. Consequently, whoever has a hand in the killing is to be disinherited, even if rightful. For example, the one who executes the *qisâs* (legal retribution), the person who gives the judgment of killing such as the judge, the witness in a murder case, are all to be disinherited. This is applicable even if the act of killing is unintentionally committed, such as the killing done by one who is asleep, insane or a child. Besides, this rule is to be applied in case the killing mistakenly results from a permissible act, such as the case of a discipliner or the physician who helps the person in treatment.

Followers of the school of Imâm Ahmad view that unrightful killing is the only kind that disinherits the killer. Unrightful killing is that which entails a legal liability, such as *qisâs* (legal retribution), *diyah* (blood money), or expiation, such as the premeditated murder, quasi-premeditated murder, and accidental homicide. This is also applicable with regard to what resembles accidental homicide, such as being the cause of killing, or the killing committed by a child, an insane or a sleeping person. In contrast to this, if the type of killing does not entail *qisâs*, *diyah* or expiation, then it does not cause one to be disinherited. To illustrate, killing someone as in *qisâs* or in self-defense does not entail blocking one from inheritance. This is also to be applied in case the killer is a just person whereas the murdered person is an oppressor of the killer and also in case the killing results from a permissible act such as disciplining or curing.

What is mentioned above is also the view of the Hanafî School whose followers consider being a cause of killing does not cause one to be disinherited, as in cases when one digs a well or puts a stone accidentally causing the inherited person to die. This is also applicable in case of accidental homicide or killing by a child or an insane person.

According to the Mâlikî School, a murderer has two states:

First case: When a murderer intentionally kills the inherited person; in such a case, the murderer is not to inherit either from the estate of the murdered or the *diyah* (blood money).

Second case: When one accidentally kills the inherited person; in such a case, one is to inherit from the murdered person's estate, but not from his *diyah*. This is because, in such a case, the killer does not intend to kill the inherited person, yet it is obligatory upon him (the killer) to pay the *diyah*, so he cannot inherit something he is obliged to pay.

On reviewing the aforesaid opinions, the preponderant one seems to be that the kind of killing that disinherits one is that which entails a legal liability, while the accidental homicide does not disinherit one, as maintained by the Hanbalî and the Hanafî Schools. This is because in case murder entails a legal liability, the killer is not excused and must bear the responsibility; thus, he is to be disinherited. However, in case killing does not entail a legal liability, the killer is excused and is not responsible for it; thus, he is not to be disinherited.

If we are to follow the opinion adopted by the followers of Imâm Ash-Shâfi'î, which states that any type of murder prevents the heir (the killer in such cases) from inheritance, this will prevent executing the prescribed punishments.

According to what is mentioned above, the generality of the Prophet's *hadîth "No (share of the) inheritance (of the murdered person) is to be given to the murderer,"* is restricted only to the case of killing unrightfully which does not entail a legal liability. Allah, Exalted be He, knows best.

Endnotes

1 Abû-Dâwûd (4564) [4/449] and Ibn-Mâjah (2646) [3/277].

2 Abû-Dâwûd (4564) [4/449], At-Tirmidhî (2114) [4/25] and Ibn-Mâjah (2645) [3/277].

VI:MARRIAGE

CHAPTER

1

Marriage

Marriage is a serious and crucial subject that made *faqihs* (Muslim jurists) dedicate great parts of their volumes to tackle it, explaining its rulings as well as its purposes and virtues. This is because marriage is ordained through the Qur'ān, the *Sunnah* (Prophetic Tradition), and juristic consensus.

Allah, Exalted be He, says:

> ***"...then marry those that please you of [other] women, two or three or four..."*** (Qur'ān: An-Nisā': 3)

In the Qur'ān, Allah, Exalted be He, also mentions the women one is prohibited to marry then says:

> ***"...And lawful to you are [all others] beyond these, [provided] that you seek them [in marriage] with [gifts from] your property, desiring chastity, not unlawful sexual intercourse..."***
>
> (Qur'ān: An-Nisā': 24)

Moreover, the Prophet (PBUH) exhorted people to marry and made marriage desirous and recommendable; He (PBUH) said:

> *"O young people! Whoever among you has the ability to marry should marry, for it helps in lowering one's gaze and guarding one's chastity (i.e. it guards one's private parts against immorality)..."*[1]

He (PBUH) also said:

> *"Marry women who are loving and very prolific, for I shall be proud of the great number of you (i.e. the Muslim nation) in comparison with (other) nations on the Day of Resurrection."*[2]

Among the glorious virtues of marriage are the following:

- Marriage involves keeping the existence of the human race, increasing the number of Muslims, causing annoyance to the disbelievers through the procreation of those striving in the cause of Allah as well as those defending His religion, Islam.
- Marriage leads to maintaining chastity and keeping away from the unlawful sexual intercourse that ruins human communities.
- Marriage involves the responsibility of men toward women that includes sheltering them and providing for them. Allah, Exalted be He, says:

  "Men are in charge of women by [right of] what [qualities] Allah has given one over the other and what they spend [for maintenance] from their wealth..." (Qur'ân: An-Nisâ': 34)

- Marriage creates an atmosphere of tranquility, mutual concord, security, and spiritual comfort between both husband and wife. Allah, Exalted be He, says:

  "And of His signs is that He created for you from yourselves mates that you may find tranquility in them..."

  (Qur'ân: Ar-Rûm: 21)

  Allah also says:

  "It is He Who created you from one soul and created from it its mate that he might dwell in security with her..."

  (Qur'ân: Al-A`râf: 189)

- Marriage is a means of keeping the human communities from being indulged in immoralities that ruin morals and eliminate virtue.

- Marriage is a means of preserving progeny, keeping blood relations, and establishing honorable families involving mercy, unity, and support in what is right.
- Marriage raises man above leading animal life and enables him to lead an honorable human life.

There are so many other virtues of lawful, honorable marriage which is based on the instructions of the Noble Book of Allah, the Qur'ân, and the *Sunnah* of His Prophet (PBUH). Marriage is a legal contract enabling each spouse to have lawful enjoyment of the other. In support of this view, the Prophet (PBUH) said:

> *"Treat women kindly, as they are (like) captives in your houses."*[3]

In another narration of the hadîth:

> *"Intercourse with them (women) has been made lawful unto you by the Word of Allah (through legal marriage)."*[4]

The marriage contract is a covenant between the two spouses, as Allah, Exalted be He, says:

> ***"...and they have taken from you a solemn covenant."***
>
> (Qur'ân: An-Nisâ': 21)

Thus, it is a binding contract obligating each spouse to observe the other's rights dutifully; Allah, Exalted be He, says:

> ***"O you who have believed, fulfill [all] contracts..."***
>
> (Qur'ân: Al-Mâ'idah: 1)

Polygamy

It has been made lawful for the man to marry more than one, provided that he is able to do so, and is certain he would not be unjust in dealing with them. Allah, Exalted be He, says:

> ***"...then marry those that please you of [other] women, two or three or four. But if you fear that you will not be just, then [marry only] one..."*** (Qur'ân: An-Nisâ': 3)

The kind of justice required from the man is to treat his wives equally as much as possible, putting them all on an equal footing regarding provision, clothing, housing, and even the number of nights spent with them.

In addition, permissibility of polygamy is one of the virtues of this *Sharî`ah* (Islamic Law). It is applicable at all times and anywhere, as it involves great benefits for men, women, and society. In explaining more, it is known that the number of women exceeds that of men due to the dangers men are more likely to face, such as wars and traveling. This results in less number of men compared to women. Thus, if it is impermissible for a man to marry more than one woman, many women will remain unmarried.

Moreover, it is known that women are afflicted with menses and confinement, so if it is made prohibited for a man to marry more than one woman, there will be many times at which a man is deprived of enjoyment and procreation. Furthermore, it is known that enjoying one's wife fully and fruitfully begins to decline when she reaches menopause at the age of fifty, unlike man, who still has the ability as well as the desire for enjoyment and procreation until he reaches senility. Therefore, if marriage is restricted to one woman, man will then miss much good in addition to losing the benefits of having progeny and procreation.

Since the number of women exceeds that of men in most communities, allowing man to marry only one woman will result in that many women will not find breadwinners to provide for them. Consequently, lacking breadwinners may lead women to immorality and corruption, and their deprivation of the joy and adornment of life. Hence, there are so many virtues resulting from the permissibility of polygamy, so may Allah curse whoever intends to view otherwise and tries to invalidate such beneficial, lawful matters.

Different Rulings on Marriage

According to the *Sharî`ah* (Islamic Law), there are five rulings on marriage: obligatory, desirable, allowable, prohibited, and detestable. Marriage becomes **obligatory** for those who fear committing *zinâ* (adultery or fornication), as marriage is a means of chastity and avoidance of what is prohibited. In this connection, **Shaykhul-Islâm Ibn Taymiyah** (may Allah have mercy on him) said,

> *"If one is in need of marriage and he fears committing a sin by leaving it, one may give priority to getting marriage over performing obligatory Pilgrimage."*[5]

Others view that marriage, for such a person, is more preferable than supererogatory Pilgrimage, Fasting, or Prayer. They also maintain that in this case one's financial state does not matter. **Sheikh Taqiyyud-Dîn** said:

> *"According to the apparent view of Ahmad as well as the majority of scholars, one should not consider wealth before marriage, as Allah, Exalted be He, says,* ***"...If they should be poor, Allah will enrich them from His bounty..."*** (Qur'ân: An-Nûr: 32) *Even the Messenger of Allah (PBUH) sometimes had nothing in his house as well*[6]*. He (PBUH) once concluded marriage for a man who could not even afford a ring of iron (as a dowry)."*[7]

Marriage becomes **desirable** when there is a desire [or libido], but there is no fear of committing unlawful sexual intercourse, as marriage involves many benefits for both men and women.

Marriage becomes **allowable** when there is no lust, but there is a desire for marriage itself, such as the case with the impotent and the old. However, in such cases marriage might be **detestable**, as it deprives the wife of the actual purpose of marriage, namely safeguarding her chastity, as a husband's impotency causes a wife great harm.

Marriage becomes **prohibited** for a Muslim man who lives in a disbelieving country engaged in a war with Muslims. Marriage in this case may expose his family to danger and being captured by the disbelievers. In addition, he will not feel secure for his wife living among them.

It is an act of the *Sunnah* (Prophetic Tradition) to marry a religious, chaste woman of a noble origin. Abû Hurayrah (may Allah be pleased with him) narrated that the Prophet (PBUH) said:

> *"A woman is married for four (reasons): her wealth, her family status, her beauty, or her religiousness. So, you should marry the religious one or else you will be a loser."*[8]
>
> (Related by Al-Bukhârî and Muslim)

Moreover, it is stated that the Prophet (PBUH) forbade marrying a woman for the sake of something other than her religiousness. To illustrate, the Prophet (PBUH) said:

> *"You should not marry women for the sake of their beauty, for it might lead them to ruin (through arrogance and conceit), nor should you marry them for the sake of their wealth, for it might*

lead them to transgression. Rather, you should marry them for the sake of their religiousness."[9]

The Prophet (PBUH) recommended that a man marry a virgin. He (PBUH) said to Jâbir (may Allah be pleased with him):

"Why have you not married a virgin so that you may play with her and she may play with you?"[10]

(Related by Al-Bukhâri and Muslim)

This is because marrying a virgin involves absolute intimacy and affection, as she has no ex-husband to whom her heart might be attached affecting her desire and affection for the present husband.

Moreover, it is considered an act of the *Sunnah* that one marries a fertile woman; one of those women known for their fecundity. Anas (may Allah be pleased with him) narrated that the Prophet (PBUH) said:

"Marry women who are loving and very prolific, for I shall be proud of the great number of you (i.e. Muslim nation) in comparison with (other) nations on the Day of Resurrection."

(Related by An-Nasâ'î and other compilers of *Hadîth*)[11]

There are also other *hadîth*s carrying the same meaning.

The ruling pertaining to marriage differs according to the condition of the person, his physical and financial ability, as well as his preparedness to shoulder its responsibility. The Prophet (PBUH) exhorts young people to get married early, as they need it more than others do. He (PBUH) said:

"O young people! Whoever among you has the ability to marry should marry, for it helps in lowering one's gaze and guarding one's chastity (i.e. it guards one's private parts against committing adultery), and whoever does not have the ability to marry should fast, for fasting is protection for him (as it diminishes one's sexual desire)."

(Related by Al-Bukhâri, Muslim, and other compilers of *Hadîth*)[12]

In explaining the aforementioned *hadîth*, some scholars view that "ability" refers to the ability to copulate, while others believe that *"ability"* here refers to the financial ability to afford marriage. In addition, the

phrase *"for it helps in lowering one's gaze,"* means that marriage helps the married one to keep away from gazing at *ajnabiyyahs*[1]. Moreover, the phrase *"and guarding one's chastity"* means that marriage keeps one away from committing fornication. Then, the Prophet (PBUH) enjoined that *"whoever does not have the ability to marry"* and cannot afford it should fast, i.e. should resort to performing voluntary fasting as a substitutive remedy, as fasting is *"protection"* against committing unlawful sexual intercourse because it diminishes one's sexual desire. This is due to the fact that abstaining from food and water lessens one's lust. In addition to this, fasting involves a special feeling of piety and fear of Allah, Exalted be He, Who says:

> ***"O you who have believed, decreed upon you is fasting as it was decreed upon those before you that you may become righteous."***
>
> (Qur'ân: Al-Baqarah: 183)

Allah, Exalted be He, also says:

> ***"...But to fast is best for you, if you only knew."***
>
> (Qur'ân: Al-Baqarah: 184)

In brief, the Prophet (PBUH) commanded resisting lust and avoiding its dangers by resorting to two successive matters. The first one is to marry when there is the ability to do so and the second is to resort to voluntary fasting in case one cannot afford marriage. This indicates that it is impermissible for a man to let himself be exposed to the dangers of sins. Allah, Exalted be He, says:

> ***"And marry the unmarried among you and the righteous among your male slaves and female slaves. If they should be poor, Allah will enrich them from His bounty, and Allah is All-Encompassing and Knowing. But let them who find not [the means for] marriage abstain [from sexual relations] until Allah enriches them from His bounty..."*** (Qur'ân: An-Nûr: 32-33)

Endnotes

1 Al-Bukhârî (5066) [9/141] and Muslim (3384) [5/175].
2 Abû-Dâwûd (3227) [3/373] and An-Nasâ'î (2050) [2/374].
3 Ibn Mâjah (1851) [2/409] and At-Tirmidhî (3096) [5/273].
4 Muslim (2941) [4/402].
5 See the footnote in "*Ar-Rawḍ Al-Murbi'*" [6/228].
6 Al-Bukhârî (2566) [5/243] and Muslim (7378) [9/308].
7 Al-Bukhârî (5087) [9/164] and Muslim (4372) [5/215].
8 Al-Bukhârî (5090) [9/165] and Muslim (3620) [5/293].
9 Ibn-Mâjah (1859) [2/415].
10 Al-Bukhârî (5367) [9/635] and Muslim (3627) [5/297].
11 Abû-Dâwûd (3227) [3/373] and An-Nasâ'î (2050) [2/374].
12 Al-Bukhârî (5066) [9/141] and Muslim (3384) [5/175].
13 *Ajnabiyyah* is any woman other than a man's wife and his legally-unmarriageable kin

CHAPTER

2

Engagement

The Prophet (PBUH) said:

"When one of you gets engaged to a woman, if he can look at what will induce him to marry her, he should do so."[1]

(Related by Imâm Ahmad and Abû Dâwûd)

He (PBUH) also said:

"Look at her, for it is better that there should be love between you."[2]

The aforesaid *hadiths* indicate the permissibility of looking at what usually appears of the body of one's fiancée furtively and also without sitting privately with her.

Faqihs say:

"It is deemed allowable for a man who intends to get engaged to a woman and believes that she is likely to consent to look at what usually appears of her body, without sitting privately with her, provided that he feels secure against temptation."

Jâbir (may Allah be pleased with him) narrated:

> *"I used to look at her (i.e. his fiancée) secretly, until I saw of her what induced me to marry her."*[3]

This indicates that a man is not to sit privately with the woman he intends to marry, and that he can look at her stealthily. Yet, one is not allowed to look except at what is usually and conventionally apparent of the body of the woman one intends to marry. This permission is restricted to the person who thinks that the woman is likely to respond to his proposal of marriage. Otherwise, if it is not attainable for the person to have a look at the woman he intends to marry, he may send a trustworthy woman to see her on his behalf, and then she may describe her to him. This is based on the *hadith* related by Imâm Ahmad stating that the Prophet (PBUH) once sent Umm Sulaym in order to see and examine a woman[4].

Whoever is asked about his opinion on someone intended to be engaged should answer honestly, mentioning the bad qualities of the intended person (if any) as well as any relevant things, which is not considered backbiting in this case.

It is prohibited for a man to use direct declaration while proposing to a widow or a divorced woman during her waiting period, such as saying to her, "I would like to marry you." This is because, Allah, Exalted be He, says:

> ***"There is no blame upon you for that to which you [indirectly] allude concerning a proposal to women..."***
>
> (Qur'ân: Al-Baqarah: 235)

Hence, Allah, Exalted be He, allows indirect allusion while proposing to a widow or a divorced woman during her waiting period, such as saying to her, "I am interested in you," or suchlike indirect expressions. This indicates the prohibition of direct declaration of proposal to a widow or a divorced woman during her waiting period, such as saying, "I would like to marry you." This is because such a direct proposal to a widow or a divorced woman may urge her to lie about her waiting period out of her desire for marriage.

Imâm Ibnul-Qayyim said:

> *"Allah prohibited direct proposal of marriage to a widow or a divorced woman during her waiting period, though she is not the one who decides the end of her waiting period. This is because direct proposal may incite her to hasten to respond and lie about the passage of her waiting period."*[5]

On the other hand, proposing to a widow or a divorced woman during her waiting period, whether through allusion or direct proposal, is permissible for him (i.e. the divorcé) who has divorced her irrevocably but less than three times, as he is allowed to remarry her during her waiting period. In this respect, **Shaykhul-Islâm Taqiyyud-Dîn** said, *"Allusion as well as direct proposal is permissible for the one (i.e. divorcé) who has the right to marry her during her waiting period."*[6]

It is prohibited for a Muslim to propose to a woman who is already engaged to another Muslim. Thus, whoever proposes to a woman and his proposal is answered, it becomes prohibited for anyone else to propose to her until the first suitor gives him permission or when the proposal of the first is rejected. The Prophet (PBUH) said:

> *"None should ask for the hand of a woman who is already engaged to his (Muslim) brother, but one should wait and see if the first suitor will marry or leave her."*
>
> (Related by Al-Bukhârî and An-Nasâ'î)[7]

Imâm Muslim also related that the Prophet (PBUH) said:

> *"None should ask for the hand of a woman who is already engaged to his (Muslim) brother until he (the first suitor) leaves her."*[8]

Moreover, Ibn 'Umar narrated that the Prophet (PBUH) said:

> *"None should ask for the hand of a woman who is already engaged to his (Muslim) brother."*[9]
>
> (Related by Al-Bukhârî and Muslim)

Al-Bukhârî also related that Allah's Messenger said:

> *"A man should not ask for the hand of a woman who is already engaged to his (Muslim) brother unless the first suitor gives her up or gives him permission (to propose to her)."*[10]

All of the aforementioned *hadîths*, as well as other ones having the same meaning, stress the prohibition of proposing to a woman who is already engaged to another Muslim. This is because such an act may spoil the engagement of the first suitor, spread hatred among people, and involve encroachment on others' rights. Hence, if the proposal of the first suitor is rejected, or he gives permission to another person to propose to her, or he leaves her, it becomes permissible for the second suitor to propose to that woman, as the Prophet

(PBUH) stipulated:

> *"... unless the first suitor gives her up or gives him permission (to propose to her)."*

This is the duty of a Muslim towards the sanctity and inviolability of his fellow Muslim whose violation is prohibited.

Nevertheless, some people do not pay the least attention to such matter. In other words, one may knowingly propose to a woman who is already engaged to another and gave her consent. By doing so, one is encroaching on another's right and spoils his proposal, which is by all means prohibited. In addition, the one who intentionally does so deserves to be rejected and punished as well.

Therefore, a Muslim should beware of such a matter and show respect toward the rights of other fellow Muslims. Every Muslim has inviolable rights that should be respected by other Muslims; a Muslim should not propose to a woman already engaged to his fellow Muslim; he should not try to cancel the purchase of his fellow Muslim trader to gain it for himself, nor should he cause any kind of harm to his fellow Muslim.

Endnotes

1 Abû-Dâwûd (2082)[2/390].
2 At-Tirmidhi (1088) [3/397], An-Nasâ'î (3235) [3/378] and Ibn Mâjah (1865) [2/418].
3 Aḥmad and Abû-Dâwûd.
4 Aḥmad.
5 See the footnote in "*Ar-Rawḏ Al-Murbi'*" [6/239].
6 See the footnote in "*Ar-Rawḏ Al-Murbi'*" [6/240].
7 Al-Bukhâri (5144) [9/294] and An-Nasâ'î (3241) [3/382].
8 Muslim (3449) [5/302].
9 Muslim (3441) [5/201] and Al-Bukhâri (2140) [4/446].
10 Al-Bukhâri (5142) [9/249].

CHAPTER

3

Marriage Contract: Integrals and Conditions

It is desirable to deliver a sermon before concluding the marriage contract. This sermon is called "the Sermon of Ibn Mas`ûd". It may be delivered by the one who concludes the contract or by anyone else of the attendants. Its wording is as follows:

> *"Verily, all praise be to Allah; we praise Him, ask His help and forgiveness, and turn to Him in repentance. We seek refuge with Him from the evils of ourselves, and from the evils of our deeds. Whomever Allah guides, for him there is no misleader, and whomever He leads astray, for him there is no guide. I testify that there is no deity but Allah, and I testify that Muhammad is His Servant and Messenger."*
>
> (Related by the Five Compliers of *Hadîth*, and deemed a *hasan* (good) *hadîth* by At-Tirmidhi)[1]

After delivering the sermon, the following three verse of Allah's Book, the Qur'ân, are to be recited. The first verse is:

> ***"O you who have believed, fear Allah as He should be feared and do not die except as Muslims [in submission to Him]."***
>
> (Qur'ân: Âlu `Imrân: 102)

The second one is:

> ***"O mankind, fear your Lord, Who created you from one soul and created from it its mate and dispersed from both of them many men and women. And fear Allah, through Whom, you ask one another, and the wombs. Indeed Allah is ever, over you, an Observer."***
>
> (Qur'ân: An-Nisâ': 1)

The third is:

> ***"O you who have believed, fear Allah and speak words of appropriate justice. He will [then] amend for you your deeds and forgive you your sins. And whoever obeys Allah and His Messenger has certainly attained a great attainment."***
>
> (Qur'ân: Al-Ahzâb: 70-71)

The Three Integral Parts of Marriage

First: Spouses must be free from any barriers that may deter the validity of their marriage. For example, the woman must not be one of those whom the prospective groom is prohibited to marry, such as being a close blood relative (marrying whom is incest), being a sister through having been breast-fed by the same woman, or being a widow or a divorced woman in her waiting period, and the like. Another example is that the man must not be a disbeliever while the woman is a believer. There are some other legal barriers that we will shed light on, if Allah wills.

Second: The bride's consent must be verified. It is expressed through the spoken form uttered by the legal guardian of the bride or anyone in his place; he says to the groom, "I marry you so-and-so."

Third: The groom's acceptance must be verified. It is expressed through the spoken form uttered by the groom in reply to the guardian, namely, "I marry her," or "I accept her marriage."

Shaykhul-Islâm Ibn Taymiyah and his disciple **Ibnul-Qayyim** maintained that marriage can be concluded by any wording that indicates the same meaning of the aforementioned spoken forms, and that it is not restricted to them. However, those scholars who made the spoken forms of marriage restricted to the aforementioned ones argue that "marriage" is explicitly referred to in the Qur'ân, without implication; Allah, Exalted be He, says:

> ***"...So when Zayd had no longer any need for her, We married her to you..."*** (Qur'ân: Al-Ahzâb: 37)

Allah also says:

> ***"And do not marry those [women] whom your fathers married..."*** (Qur'ân: An-Nisâ': 22)

In fact, this does not mean that marriage is not to be consummated except through these spoken forms; and Allah knows best.

A marriage contract is deemed valid for a mute when the legal form of consent or acceptance is expressed through writing or understood gesture.

When mutual consent and acceptance are reached, marriage is to be deemed valid even if the one uttering the legal spoken form of marriage is jesting and does not mean the actual marriage. This is due to the *hadîth* in which the Prophet said:

> *"There are three things which, whether undertaken seriously or in jest, are treated as serious: divorce, marriage, and taking back a wife (after revocable divorce)."*
>
> (Related by At-Tirmidhi)[1]

The Four Conditions for the Validity of Marriage

1- Accurate Specification of the Two Spouses

Each of the two spouses must be accurately specified while referring to them. For example, it is insufficient for a bride's father to say to the groom as a legal spoken form, "I marry you my daughter," while he has many daughters. Similarly, he cannot say to the groom's father, "I marry my daughter to your son," while the latter has many sons. Accordingly, the spouse referred to must be accurately specified either by pointing at him/her, referring to him/her by mentioning his/her name, or mentioning a certain quality that distinguishes him/her.

2- Mutual Consent

There must be mutual consent between the two spouses; marriage is not deemed valid if any of the two is forced to accept it. To illustrate, Abû Hurayrah (may Allah be pleased with him) narrated that the Prophet (PBUH) said:

"A previously married woman should not be given in marriage except after consulting her, and a virgin should not be given in marriage except after her permission."

(Related by Al-Bukhârî and Muslim)[3]

This is applied except for the minor who has not reached maturity or the insane, as the legal guardian can marry any of them without their permission.

3- The Bride's Guardian's Permission

A woman is to be given in marriage by the permission of her legal guardian. This is due to the *hadîth* of the Prophet (PBUH) in which he says:

"No marriage (is valid) without (the permission of) a guardian..."

(Related by the Five Compliers of *Hadîth* except An-Nasâ'î)[4]

Consequently, if a woman gives herself in marriage without a legal guardian, her marriage is regarded as invalid, as such an act is a means leading to unlawful sexual intercourse. This is because a woman is considered partially unable to choose her best-suited husband. In this respect, Allah, Exalted be He, addresses legal guardians of women saying:

"And marry the unmarried among you..."

(Qur'ân: An-Nûr: 32)

Allah also says:

"...Do not prevent them from remarrying..."

(Qur'ân: Al-Baqarah: 232)

There are some other verses in the same regard.

The legal guardian of a woman is assigned according to this order:

- Her father
- The one authorized by the father to be her guardian
- Her paternal grandfather or one of his paternal male ascendants
- Her son or one of his paternal male descendants
- Her full brother
- Her paternal brother
- A son of her full or paternal brothers
- Her father's full brother
- Her father's paternal brother
- A son of her father's full or paternal brother
- The closest agnate relative
- Her emancipator
- The ruler

4- The Presence of Two Witnesses

The marriage contract must be witnessed due to the *hadîth* narrated by Jâbir which states that the Prophet (PBUH) said:

"No marriage (is valid) without (the permission of) a guardian and (in presence of) two just witnesses."

Hence, marriage is not deemed valid except with the presence of two just witnesses.

At-Tirmidhi said:

"This condition has been followed by the men of religious knowledge among the Companions of the Prophet (PBUH), their followers who came after them, and others. They maintained thus, 'No marriage is valid without the presence of witnesses.' No one among them disagreed in this regard except some of the late men of knowledge."[5]

Endnotes

1 Abû-Dâwûd (2118) [2/408], At-Tirmidhi (1106) [3/413], An-Nasâ'i (3277) [3/397], Ibn Mâjah (1892) [2/434] and Muslim (2005) [3/395].
2 Abû-Dâwûd (2194) [2/447], At-Tirmidhi (1186) [3/490] and Ibn Mâjah (2039) [2/510].
3 Al-Bukhâri (5136) [9/240] and Muslim (3458) [5/206].
4 Abû-Dâwûd (2085) [2/392], At-tirmidhi (1102) [3/407] and Ibn Mâjah (1881) [2/428].
5 See the footnote in "*Ar-Rawd Al-Murbi'*" [6/276-277].

CHAPTER

4

Equivalence in Marriage

The two spouses must be equivalent in four things:

1- Religiousness

A defiantly disobedient or a corrupt person is not a suitable match for a chaste, virtuous woman. This is because the testimony or report of such a person is rejected, which is considered a sign of inferiority.

2- Freedom

A slave (or a slave who is partially free due to his agreement with his master to be fully free after the payment of a certain amount of money or after his master's death) is not a suitable match for a free woman, as the former is inferior due to slavery.

3- Profession

One of a lowly profession, such as a cupper or a weaver, is not a suitable match for a daughter of one in a high profession, such as a merchant or a businessman.

4- Solvency

The groom should be solvent enough to afford the dowry and marriage expenses. That is, an insolvent man is not a suitable match for a prosperous woman, as this causes her harm owing to his inability to meet her due expenses.

Accordingly, if the condition of any of the two spouses is different from that of the other with regard to any of the above-mentioned four matters, equivalence is violated. However, this does not affect the validity of marriage, as equivalence is not a condition for its validity. To illustrate, the Prophet (PBUH) instructed Fâṯimah Bint Qays to marry Usâmah Ibn Zayd,[1] so their marriage was consummated due to the Prophet's command regardless of their inequality[2]. Yet, equivalence is still regarded as a condition required for a spouse's commitment to the marriage agreement. For example, if a woman was given in marriage to someone who is not a suitable match for her, she or any of her legal guardians who do not consent to such an inequality may cancel the marriage contract. At the lifetime of the Prophet (PBUH), it happened that a man married his daughter to his nephew in order to raise the latter's meanness and low status, so the Prophet (PBUH) gave her the right of option whether to stay with him or to be separated[3]. Still, some scholars maintain that equivalence is a condition for the validity of marriage, such as Imâm Aẖmad according to one of the opinions attributed to him.

Sheikh Taqiyyud-Din said:

> *"According to the opinion of Imâm Aẖmad, if the husband turns out to be unequal to the wife, they are to be separated. Moreover, the guardian does not have the right to marry the woman who is under his guardianship (daughter, sister, etc.) to a man that is not a suitable match for her. Similarly, it is impermissible for a man or a woman to marry an unsuitable match. Also, according to Aẖmad, equivalence is not just like marital financial matters such as the dowry that the bride or any of her legal guardians may demand or disregard. Rather, it is a matter that has to be well considered."*[4]

Endnotes

1 Fāṯimah Bint Qays was a free woman while Usāmah Ibn Zayd was a very black freed salve.
2 Muslim (3681) [5/334].
3 An-Nasā'i (3269) [3/395].
4 See the footnote in *"Ar-Rawḏ Al-Murbi'"* [6/282].

CHAPTER

5

Unmarriageable Women

Unmarriageable Women Are of Two Kinds:

First: Women Eternally Prohibited for One to Marry

There are fourteen kinds of them; seven are prohibited due to blood relations and seven are prohibited due to other special reasons. They are pointed out in the verses number 22 and 23 of the Sura of *An-Nisâ'* (*Women*)[1].

A- Women Eternally Prohibited for One to Marry Due to Blood Relations

1) The mother, grandmothers, and on up; Allah, Exalted be He, says:

"Prohibited to you [for marriage] are your mothers..."

(Qur'ân: An-Nisâ': 23)

2) Daughters, granddaughters, daughters of granddaughters, and on down: Allah, Exalted be He, says:

"Prohibited to you [for marriage] are... your daughters..."
(Qur'ân: An-Nisâ': 23)

3) Sisters: One is prohibited to marry one's sister, whether she is a full, paternal, or maternal sister. This is because, Allah, Exalted be He, reveals:

"Prohibited to you [for marriage] are... your sisters..."
(Qur'ân: An-Nisâ': 23)

4) Sister's daughters, their sons' or daughters' daughters, and on down; Allah, Exalted be He, says:

"Prohibited to you [for marriage] are ... [and] your sister's daughters..." (Qur'ân: An-Nisâ': 23)

5) Brother's daughters, their sons' or daughters' daughters, and on down; Allah, Exalted be He, says:

"Prohibited to you [for marriage] are ... [and] your sister's daughters..." (Qur'ân: An-Nisâ': 23)

6) Paternal aunts and (7) maternal aunts; Allah, Exalted be He, says:

"Prohibited to you [for marriage] are... [and] your father's sisters, your mother's sisters..." (Qur'ân: An-Nisâ': 23)

B- Women Eternally Prohibited for One to Marry Due to Special Reasons

1) It is eternally prohibited for a man to remarry his ex-wife against whom he has sworn allegation of adultery and divorced by public imprecation. In this respect, Al-Jawzajânî reported that Sahl Ibn Sa'd said:

"According to the Sunnah (Prophetic Tradition), the husband and wife who swear allegation against each other (i.e. allegation of adultery sworn by the husband and allegation sworn by the wife in defense of her honor) are to be separated and never be reunited."[2]

Al-Muwaffaq commented, *"We know none who has a different view."*[3]

2) The same categories of relatives who are prohibited for one to marry because of one's blood relations to them are also prohibited to one by foster suckling relations. Thus, women that are prohibited for marriage

due to suckling are the same as those prohibited for marriage due to blood relations, such as:

(a) Women by whom one is breastfed

(b) Sisters through suckling

Allah, Exalted be He, says:

"Prohibited to you [for marriage] are... your [milk] mothers who nursed you, your sisters through nursing..."

(Qur'ân: An-Nisâ': 23)

In this regard, the Prophet (PBUH) said:

"All things which become unlawful because of blood relations are unlawful because of the corresponding foster suckling relations."[1]

(Related by Al-Bukhârî and Muslim)

3) The wives of one's father, the wives of one's grandfathers, and on up, are prohibited for one to marry as soon as the marriage contract of the father (or grandfather, etc.) is concluded. Allah, Exalted be He, says:

"And do not marry those [women] whom your fathers married..."

(Qur'ân: An-Nisâ': 22)

4) The wives of one's sons, the wives of one's grandsons, and on down, are prohibited for one to marry. Allah, Exalted be He, says:

"...And [also prohibited are] the wives of your sons who are from your [own] loins..." (Qur'ân: An-Nisâ': 23)

5) The wife's mother, her grandmother, and on up, are prohibited for one to marry as soon as the marriage contract (between one and one's wife) is concluded. Allah, Exalted be He, says:

"Prohibited to you [for marriage] are... your wives' mothers..."

(Qur'ân: An-Nisâ': 23)

6) Daughter and granddaughters of one's wife, and on down, are prohibited for one to marry once one consummates the marriage with one's wife. Allah, Exalted be He, says:

"Prohibited to you [for marriage] are... your stepdaughters under your guardianship [born] of your wives unto whom you

have gone in. But if you have not gone in unto them, there is no sin upon you..." (Qur'ān: An-Nisā': 23)

After mentioning the women prohibited for one to marry, it will be more convenient to state the verse containing them as a whole once again; Allah, Exalted be He, says:

"Prohibited to you [for marriage] are your mothers, your daughters, your sisters, your father's sisters, your mother's sisters, your brother's daughters, your sister's daughters, your [milk] mothers who nursed you, your sisters through nursing, your wives' mothers, and your stepdaughters under your guardianship [born] of your wives unto whom you have gone in. But if you have not gone in unto them, there is no sin upon you. And [also prohibited are] the wives of your sons who are from your [own] loins, and that you take [in marriage] two sisters simultaneously, except for what has already occurred. Indeed, Allah is Ever-Forgiving and Merciful."

(Qur'ān: An-Nisā': 23)

Second: Women Temporarily Prohibited for One to Marry

They are of two kinds:

A- Women Prohibited for One to Marry Due to Simultaneous Marriage

It is prohibited for one to marry two sisters and have them as wives at the same time. Allah, Exalted be He, says:

"Prohibited to you... that you take [in marriage] two sisters sim ultaneously..." (Qur'ān: An-Nisā': 23)

It is also prohibited to take in marriage a woman and her paternal or maternal aunt at the same time. This is because the Prophet (PBUH) said:

"A man is prohibited to marry both a woman and her paternal aunt or a woman and her maternal aunt (at the same time)."[5]

(Related by Al-Bukhāri and Muslim)

The Prophet (PBUH) showed the idea behind such prohibition, as he said:

"If you did so, then you would sever your ties of kinship."

This is because fellow wives usually feel jealous toward each other, so if they were relatives, such a marriage would cause severing the ties of their kinship.

However, if a woman is divorced and her prescribed waiting period is over, her sister and her paternal or maternal aunt become lawful for her ex-husband to marry, as the reason for prohibition is not there anymore.

One is also prohibited to have more than four women as wives at the same time. This is because Allah, Exalted be He, says:

> ***"...then marry those that please you of [other] women, two or three or four..."*** (Qur'ân: An-Nisâ': 3)

The Prophet (PBUH) ordered those new converts to Islam who had more than four wives under their authority to choose just four of them[6].

B- Women Prohibited for One to Marry Due to Contingent Matters

It is prohibited to marry a widow or a divorced woman in her legal waiting period, for Allah, Exalted be He, says:

> ***"...And do not determine to undertake a marriage contract until the decreed period reaches its end..."***
> (Qur'ân: Al-Baqarah: 235)

The idea behind such prohibition is that the widow or the divorced woman might be pregnant, which might lead to lineal confusion and intermingling.

It is also prohibited for one to marry a woman who has committed *zinâ* (adultery or fornication) if one knows about it until she repents and her waiting period is over. Allah, Exalted be He, says:

> ***"...and none marries her except a fornicator or a polytheist, and that [i.e. marriage to such persons] has been unlawful to the believers."*** (Qur'ân: An-Nûr: 3)

One is prohibited to remarry the woman whom he has divorced by three pronouncements of divorce until she validly gets married to another husband. Allah, Exalted be He, says,

> ***"Divorce is twice..."*** (Qur'ân: Al-Baqarah: 229)

Then Allah says:

> ***"And if he has divorced her [for the third time], then she is not lawful to him afterward until [after] she marries a husband other than him..."*** (Qur'ân: Al-Baqarah: 230)

It is prohibited for one to marry a *muhrim*[7] woman until she gets out of her state of *ihrâm*. Similarly, it is prohibited for a *muhrim* man to conclude

a marriage contract during the state of *ihrâm* (a state of ritual consecration during *Hajj* or *'Umrah*). The Prophet (PBUH) said:

> *"A muhrim must neither marry himself, nor arrange the marriage of another one, nor should he make the proposal of marriage."*
>
> (Related by the Group of Compliers except Al-Bukhârî)[8]

A Muslim woman is prohibited to get married to a disbelieving or polytheistic man, for Allah, Exalted be He, addresses Muslim women saying:

> ***"...And do not marry polytheistic men [to your women] until they believe..."*** (Qur'ân: Al-Baqarah: 221)

Likewise, a Muslim man is prohibited to marry a disbelieving or polytheistic woman. Allah, Exalted be He, says:

> ***"And do not marry polytheistic women until they believe..."***
>
> (Qur'ân: Al-Baqarah: 221)

Allah, Exalted be He, also says:

> ***"...And hold not to marriage bonds with disbelieving women..."***
>
> (Qur'ân: Al-Mumtahinah: 10)

However, the aforementioned verse does not apply to Jewish or Christian free women, as it is permissible for a Muslim man to marry any of them, for Allah, Exalted be He, addresses Muslim men saying:

> ***"...And [lawful in marriage are]... chaste women from among those who were given the Scripture before you..."***
>
> (Qur'ân: Al-Mâ'idah: 5)

Scholars unanimously agree that this verse is regarded as an exception of the general rule stated in the aforementioned two verses, (2: 221) and (60: 10), which prohibit the marriage between disbelieving or polytheistic women and Muslim men.

A free Muslim man is prohibited to marry a slave Muslim woman, as such a marriage causes his children to be slaves of his wife's master. It is permissible to marry a slave Muslim woman **only** when one fears committing fornication and one cannot afford marrying a free Muslim woman or afford the price of a slave woman to emancipate and marry her. Allah, Exalted be He, says:

> ***"And whoever among you cannot [find] the means to marry free, believing women, then [he may marry] from those whom your***

right hands possess of believing slave girls... This [allowance] is for him among you who fears affliction [i.e. sin]..."

(Qur'ân: An-Nisâ': 25)

A slave is prohibited to marry his mistress according to the consensus of Muslim scholars. This is because being a mistress of a slave contradicts being his wife, as the rights, duties, and rulings are different in each case. Similarly, a master is prohibited to marry his slave girl. This is because the contract of possessing a woman is stronger than that of marrying her, and a strong contract cannot be combined with a weaker one.

Having sexual intercourse with one's slave girl has the same ruling as having sexual intercourse through a marriage contract, provided the aforementioned conditions are considered. In other words, those who are temporarily prohibited for one to marry – such as a widow or a divorced woman in her waiting period, a *muhrim* woman, a female fornicator, or a woman whom one has divorced thrice – are prohibited for one to have sexual intercourse with as one's slave women. This is because if a marriage contract is prohibited as a means of lawful sexual intercourse in such cases, then having sexual intercourse with one's slave woman, with greater reason, is prohibited in these cases as well.

Endnotes

1 Chapter No. 4 of the Qur'ân.
2 Abû-Dâwûd (2250) [2/474] and Al-Bukhâri (7304) [13/339].
3 See the footnote in "*Ar-Rawd Al-Murbi'*" [6/286].
4 Al-Bukhâri (2644) [5/312] and Muslim (3564) [5/364].
5 Al-Bukhâri (5109) [9/200] and Muslim (3422) [5/193].
6 Abû-Dâwûd (2241) [2/469] and Ibn Mâjah (1952) [2/464].
7*Muhrim*: The one in a state of ritual consecration for *Hajj* (Pilgrimage) or *'Umrah* (Lesser Pilgrimage).
8 Muslim (3432) [5/196], Abû-Dâwûd (1841) [2/289], At-Tirmidhi (840) [3/199], An-Nasâ'i (2842) [3/211] and Ibn Mâjah (1966) [2/472].

CHAPTER

6

Conditions Made Before Marriage

They are conditions set in the marriage contract by one of the two spouses to be fulfilled by the other in the best interest of the former. They are stipulated whether through the marriage contract or any previous agreement. Such conditions are of two kinds:

First: Valid Conditions

According to the majority of *faqihs*, it is a valid condition when a woman stipulates that her suitor must divorce his first wife, as such a divorce is in her interest. Other scholars view that such a condition is invalid, as the Prophet (PBUH) forbade a woman to ask for the divorce of another woman so as to take her place as a wife[1]. This Prophetic forbiddance indicates the invalidity of such a condition.

Among the valid conditions made by a woman before marriage is when she stipulates that her suitor must not (sexually) enjoy a slave girl or marry

another woman after their marriage. This is a valid condition that has to be fulfilled by the husband; otherwise, she has the right to invalidate the marriage. In this regard, the Prophet (PBUH) said:

> *"The worthiest conditions to be fulfilled are those that make it legal for you to have sexual relations (i.e. the conditions set in the marriage contract)."*[2]

Among such valid conditions is when the bride stipulates that her suitor must not take her out of her house or homeland. Thus, the man must not take her out except by her permission in accordance with her condition. Likewise, it is a valid condition if the bride stipulates that her future husband must not separate between her and her children or parents. This condition must be fulfilled by the husband; otherwise, she has the right to rescind the marriage contract.

It is also a valid condition if the bride stipulates a larger amount of dowry or that the dowry must be paid in a certain currency. This is a valid and binding condition that the groom must fulfill; otherwise, she has the right to invalidate the marriage contract. Thus, she has the option to invalidate it at anytime she likes, unless there is a sign of her consent although being aware of his violation of her condition. In such a case, her right of choice is to be disregarded. In this regard, 'Umar Ibnul-Khaṭṭâb (may Allah be pleased with him) obliged a man to fulfill what his wife made as a condition before their marriage. The man said:

> *"They (women) may divorce us then!" 'Umar answered, "The judgment on rights is based upon the stated conditions."*[3]

This view is also supported by the *ḥadith* of the Prophet (PBUH) in which he says:

> *"Muslims must keep to the conditions they have made."*[4]

The great scholar Ibnul-Qayyim said:

> *"Such conditions must be kept, as they are the worthiest to be fulfilled according to the principles of Sharî'ah (Islamic Law), reasoning, and sound analogical deduction. Hence, if the woman does not consent to give herself to someone except on a certain condition, such a condition must be fulfilled; otherwise, the marriage contract will not be established on her consent, and it will make her liable for uncalled-for duties that are not enjoined on her by Allah and His Messenger."*[5]

Second: Invalid Conditions

They are of two kinds:

A- Invalid Conditions Invalidating Marriage

They involve three kinds:

1- *Shighâr* Marriage (Marriage of Exchanging Women under Guardianship)

It is the type of marriage in which a guardian gives his daughter (or a woman under his guardianship) in marriage to another person on the condition that the other gives him his daughter or a woman under his guardianship) in marriage too, and without any dowry paid by either. In this type of marriage, a woman is given in marriage in return for another. Scholars unanimously agree that such a marriage is prohibited; it is deemed invalid and the couple must be legally separated in this case, whether they stated that there is no dowry paid or they kept silent about it. To illustrate, Ibn `Umar (may Allah be pleased with him) narrated:

"The Prophet (PBUH) forbade shighâr marriage, which means that someone marries his daughter to another and the latter marries his daughter to the former, without any dowry paid by either."[6]

(Related by Al-Bukhârî and Muslim)[7]

Sheikh Taqiyyud-Dîn said:

"The unmistakable conclusion is that Allah prohibited the marriage of shighâr. This is because the legal guardian must not give his daughter in marriage except to the one who is considered a suitable match for her. In addition, the guardian is supposed to look for her best interest, not just to satisfy his desire in such a marriage exchange. Moreover, the dowry is the bride's due right, not the guardian's. Therefore, neither the guardian nor the father is to give the woman in marriage unless in her best interest, not to favor his own desire and interest over hers. Otherwise, his guardianship is deemed invalid. When the guardian exchanges the woman under his guardianship in return for another, he then is not looking for her best interest. Thus, he is acting as if he is giving her in marriage in return for some money that would be his not hers; both cases are impermissible. Consequently, if he pretends a dowry was paid as a way to make this marriage lawful while in fact intending shighâr marriage, it will not be permissible, as stated

by Imâm Ahmad. This is because his real aim is to marry another woman in return for (marrying) his daughter (or any woman under his guardianship). In this respect, Shari`ah (Islamic Law) states that such a behavior of the guardian is only intended to serve his own desire, not the woman's best interest, whether there is a dowry or not, as maintained by Mu`âwiyah and others. However, Ahmad views it permissible only when there is a dowry, which is not just intended to be a means of cheating, provided the woman's interest with regard to her due dowry has been considered."[8]

Still, if there is a certain dowry given separately to each of the two brides, without any intention of cheating, provided that each of the two brides gives her consent, such a marriage then is deemed valid, as the causative of harm is no longer there.

2- *Muhallil* Marriage

It is a kind of unlawful marriage when a man marries a woman, who is divorced irrevocably for three times, just to make her lawful to be remarried to her former husband, on the condition that he will divorce her once this purpose is achieved. Whether there is a condition stated in the marriage or agreed upon before concluding the contract or not, such marriage is deemed invalid anyway according to the following *hadith*:

"The Prophet (PBUH) said to his Companions, 'Shall I tell you about the borrowed billy goat?' They (the Companions) said, 'Yes, O Messenger of Allah!' He (PBUH) said, 'It is the muhallil;[9] *may Allah curse the muhallil and the muhallal-lahu.' "*[10]

(Related by Ibn Mâjah, Al-Hâkim, and other compilers of *Hadith*)[11]

3- The Marriage Dependent on a Future Condition

An example of such marriage is when the guardian of the woman says to the suitor, "I will let you marry her when the first of so-and-so month comes," or "...if her mother consents." Such a marriage contract is deemed invalid, for marriage is considered a contract of compensation (represented in the dowry that makes it lawful for the man to enjoy the woman as a wife). Therefore, it is invalid to make such a contract dependent on a future possibility. Similarly, it is invalid to make the marriage contract temporary, as when a guardian says to the suitor, "I will let you marry her on the condition that you divorce

her tomorrow," or, "I will let you marry her for a month (or a year)." Such temporary marriage is what is called "marriage of *mut'ah*", i.e. the temporary marriage intended just for having sexual intercourse.

Sheikh Taqiyyud-Dîn said:

"All the many elaborate mutawâtir (continuously recurrent) hadîths agree that Allah, Exalted be He, prohibited the marriage of mut'ah (temporary marriage) after it had been made lawful."[12]

Moreover, **Al-Qurtubî** said:

"All hadîths agree that the time when the marriage of mut'ah was lawful did not last for long, as it was soon prohibited. Then, both the Salaf (early Muslim scholars) and the Khalaf (late Muslim scholars) unanimously agree on its prohibition, except for those scholars of the Râfidah[13] *whose opinion counts for nothing."*

B- Invalid Conditions that do not Invalidate Marriage

If there is a condition in the marriage contract that involves violating any of the woman's rights, such a condition is invalid though the marriage itself is still deemed valid. Examples of such invalid conditions that do not invalidate marriage are the cases when the man stipulates that there will be no dowry for the woman or that there will be no alimony for her, or that the nights he will spend with her will be less than those of her fellow wife. Though such conditions are invalid, they do not invalidate the marriage, as they are of additional meaning to the marriage contract. Thus, mentioning them in the contract is not necessary, and ignoring them is not harmful.

For instance, if the suitor makes a condition that the woman must be a Muslim, and then she turns out to be one of the People of the Scripture, i.e. a Christian or a Jew, the marriage in this case is valid, and the husband has the choice whether to invalidate it or not. Similarly, if the suitor stipulates that the woman must be a virgin, a pretty woman, or a woman of noble origin, and then he discovers that she is otherwise, he has the right to invalidate the marriage, as his condition is not fulfilled.

Endnotes

1 Al-Bukhârî (2140) [4/446] and Muslim (3429) [5/196].
2 Al-Bukhârî (2721) [5/396] and Muslim (3457) [5/205].
3 Al-Bukhârî [5/396].
4 Abû-Dâwûd (3594) [4/16].
5 See the footnote in "*Ar-Rawd Al-Murbi`*" [6/315].
6 Al-Bukhârî (5112) [9/203] and Muslim (3450) [5/203].
7 This ruling also applies to any woman under one's guardianship such as one's daughter, sister, etc.
8 See the footnote in "*Ar-Rawd Al-Murbi`*" [6/318-319].
9 The *muhallil*: The one who marries a woman who has been irrevocably divorced three times to make her lawful for her ex-husband to remarry.
10 The *muhallal-lahu*: The former husband; the beneficiary from such marriage.
11 Ibn Mâjah (1936) [2/455] and Al-Hâkim (2863) [2/237].
12 See the footnote in "*Ar-Rawd Al-Murbi`*" [6/325].
13 The *Râfidah*: A Shiite group who refused the caliphates of Abû Bakr As-Siddîq and `Umar Ibnul-Khattâb and waged accusations against them and against many of the Prophet's Companions as well.

CHAPTER

7

Defects in Spouses

There are defects that if found in one of the married couple, the other has the right of option whether to cancel the marriage contract or not. The following are some examples:

- If a wife finds out that her husband is unable to copulate with her due to his impotency, she has the right to rescind the marriage contract. In addition, if a woman claims that her husband is impotent and the latter does not deny it, the husband is to be given a chance for a year (to copulate with her). Yet, if he still could not copulate with her during that period, she has the right to rescind the marriage contract.
- If the husband finds that his wife is afflicted with a shortcoming that hampers copulation, such as colpatresia, and that such a defect is incurable, the husband then has the right to rescind the marriage contract.

- If one of the two spouses finds a defect in the other, such as hemorrhoids, insanity, vitiligo, leprosy, baldness, or halitosis, the_former then has the right of choice whether to cancel the marriage contract or not due to the repulsion caused by such defects.

The great scholar **Ibnul-Qayyim** said:

> *"Every defect that causes a spouse to be disinclined to the other and prevents the fulfillment of the purpose of marriage (i.e. copulation) entails the right of choice (whether to cancel it or not). Invalidation in this case is worthier than the invalidation of a trade transaction (due to a defect)."*[1]

The right of option to rescind the marriage contract is due to the spouse who does not accept the defect of the other, even if the former has a similar or a different defect. This is because man does not feel disgusted with his own defects. However, if any of the married couple accepts the defect of the other, provided being aware of the defect and showing a sign of acceptance such as saying, "I accept that defect," such a spouse does not have the right of option to rescind the marriage contract (due to that defect) afterwards.

When one of the married couple has the right of option (to rescind the marriage contract or not), the execution must be done by the judge (or the one in authority), as such a matter needs *ijtihâd* and consideration. Thus, the judge (or the one in authority) can rescind the marriage contract if demanded by the claimant spouse, or give the latter permission to do so.

If the contract is rescinded before the consummation of marriage, the wife does not have the right to claim her dowry. This is because if she is the claimant of the rescinding of the marriage contract, then she is the one who causes separation. On the other hand, if the husband was the claimant of the rescinding, then it means that she has not told him about her defect. In both cases, she does not have the right to claim her dowry. However, if the marriage is rescinded after consummation, the wife has the right to claim the dowry specified in the marriage contract. This is because the wife's dowry becomes obligatory for being stated in contract and settled by the consummation of the marriage (i.e. having sexual intercourse). Thus, the dowry becomes the wife's right and cannot be invalidated in this case.

It is invalid to marry a young girl, an insane woman, or a slave girl, to a man who is afflicted with a defect that affects the consummation of the marriage. This is because the guardian is supposed to look for the best interest of the

woman under his guardianship. Yet, if the guardian is not acquainted with the suitor's defect, he is to rescind the marriage contract once he knows about it in order to spare the woman under his guardianship the harmful consequences.

In this connection, if a sane, mature woman gives her consent to marry an impotent man or one whose penis is amputated, the guardian does not have the right to prevent the marriage, as sexual intercourse is a matter that concerns the bride alone, no one else. However, if she accepts to marry an insane person, a leper, or a man afflicted with vitiligo, her guardian can prevent the marriage in this case, as the negative effects of the husband's defect may exceed the wife to befall their children, in addition to the blemish that may befall the family.

Endnotes

1 See "*Zādul- Ma'ād*" [5/166].

CHAPTER

8

Marriage of Disbelievers

"Disbelievers" here refers to the Christians, the Jews, and the people of other beliefs such as magi and idolaters. This chapter deals with the rulings on the marriages of such disbelievers if they convert to Islam or seek the judgment of the Islamic judiciary concerning marital cases while they are still disbelievers.

The rulings on the marriages of the disbelievers are the same as those on the marriages of Muslims with respect to validity, divorce, *zihâr*,[1] *ilâ'*,[2] alimony, and the nights one spends with one's wives. That is to say, the women a disbelieving man is prohibited to marry are the same as those prohibited for a Muslim man to marry (such as the mother, the sister, etc). This is because the disbelieving married women are referred to as "wives" in the Qur'ân; Allah, Exalted be He, says:

"And his wife [as well] – the carrier of firewood."

(Qur'ân: Al-Masad: 4)

Allah also says:

> ***"And the wife of Pharaoh said..."*** (Qur'ân: Al-Qasas: 9)

Hence, referring to those disbelieving women as "wives" in the Qur'ân indicates the validity of their marriage.

Shaykhul-Islâm Ibn Taymiyah (may Allah have mercy on him) said:

> *"The sound opinion is that the marriages of disbelievers which are viewed prohibited in Islam are absolutely prohibited (in any other religion). If they do not convert to Islam, they will be punished for them (in the Hereafter), but if they become Muslims, they will be pardoned for them, as they have been unaware of the prohibition of such marriages. As for the validity or invalidity of such marriages, they are viewed valid from one perspective and invalid from another. If what is meant by validity is the lawfulness of taking full responsibility as a couple and fulfilling the marriage contract, then the validity of their marriage in this case is dependent on its consummation according to the Islamic regulations. However, if what is meant by validity is the enforceability of the rulings pertaining to marriage, such as the rescindment of the marriage contract due to a threefold irrevocable divorce, the effectiveness of divorce, and the establishment of marriage and the resultant chastity, then the marriage is deemed valid."*[3]

Among the rulings on the disbelievers' marriages is that their invalid marriages are to be conceded to on two conditions:

a. Their invalid marriages are to be conceded (by Muslims) if they believe them to be valid in their creed. Whatever marriages they do not deem valid are not to be conceded, as they are not admitted in their religion.

b. Their invalid marriages are to be conceded as long as they do not seek the judgment of the Islamic judiciary in this concern. But if they do, the Muslims are not to concede such marriages. This is because Allah, Exalted be He, says:

> ***"And judge, [O Muhammad], between them by what Allah has revealed..."*** (Qur'ân: Al-Mâ'idah: 49)

In this regard, if the disbelievers believe in the validity of their marriages according to their creed and do not seek the Islamic judgment, we are not to disapprove of them. To illustrate, the Prophet (PBUH) took *jizyah* from the magi of Hajar and did not object to their marriages

although he (PBUH) knew that they allowed marrying their legally unmarriageable kin[4]. In addition, many people converted to Islam in the lifetime of the Prophet (PBUH) and he conceded their marriages without pointing out the way they were consummated.

If a disbelieving couple comes to Muslims seeking their judgment before the consummation of their marriage, Muslims are to conclude it in accordance with the religion of Islam, i.e. there must be the groom's spoken proposal, the bride's consent, the bride's guardian, and two equitable Muslim witnesses. Allah, Exalted be He, says:

"...And if you judge, judge between them with justice..."

(Qur'ān: Al-Mā'idah: 42)

However, if a disbelieving couple seeks the Islamic judgment after the consummation of their marriage, Muslims are not to object to the manner of its consummation.

Similarly, if the two disbelieving spouses convert to Islam, Muslims are not to object to the way their marriage was consummated or whether the conditions for its validity were there or not. Rather, if such a couple comes seeking the Islamic judgment regarding their marriage, Muslims are to consider that matter at the time when they seek the Islamic judgment or the time of their conversion to Islam. Hence, if the wife then is among the women lawful for her husband to marry as a Muslim without any legal barrier, the marriage is to be approved of. Since there has been no legal barrier from the beginning, there is nothing to prevent maintaining their marriage after their conversion to Islam. Yet, if the wife is originally prohibited for the man to marry (at the time when they seek the Islamic judgment or at the time of their conversion to Islam), they are to be separated. This is because the invalidity of their marriage contract from the beginning causes the prohibition of its being continued.

As for the dowry specified for the wife before their conversion to Islam, if it is something lawful, she can have it, for it is her due right according to the marriage contract, and there is no legal reason preventing its being given to her. However, if the dowry is something corrupt or unlawful, such as wine and swine, there will be two rulings:

First, if the wife has already received it as her dowry, then it is deemed fulfilled, i.e. she is not entitled to get something instead, as she has received it according to their previous creed (i.e. disbelief). Thus, the

obligation of the dowry is deemed fulfilled on the part of the husband. Moreover, if Muslims raise their objection on such matters, it will cause difficulty and disincline people to convert to Islam. Therefore, such matters are pardoned due to the married couple's conversion to Islam just like all other acts disbelievers used to practice before their conversion to Islam.

Second, if the wife has not got such an unlawful dowry then, a proper lawful dowry like that given to ones like her is to be specified for her. However, if she has already received part of her unlawful dowry during the time of disbelief, the other part is to be estimated and given to her according to the proper lawful dowry like that given to ones like her. Similarly, if her dowry has not been specified before converting to Islam, then she is to receive a proper lawful dowry like that given to ones like her, as it is invalid not to specify a dowry in the marriage contract.

Moreover, if the two spouses convert to Islam at the same time, their marriage is to be maintained, as there is no religious distinction between them.

Furthermore, if the husband of a Christian or a Jewish woman converts to Islam whereas she does not, their marriage is to be maintained, as a Muslim man is originally allowed to marry a Christian or a Jewish woman, so it is valid, with greater reason, to maintain her as a wife after the husband's conversion to Islam.

On the other hand, if a disbelieving woman converts to Islam while being married to a disbeliever and before the consummation of marriage, their marriage is invalidated. Allah, Exalted be He, says:

"...then do not return them to the disbelievers; they are not lawful [wives] for them, nor are they lawful [husbands] for them..."

(Qur'ân: Al-Mumtahinah: 10)

Accordingly, the woman in this case does not have the right to claim her dowry, as the rescindment of marriage is on her part.

Similarly, if a husband of a disbelieving woman, who is neither a Christian nor a Jew, converts to Islam before the consummation of marriage, their marriage is invalidated. Allah, Exalted be He, says:

"...And hold not to marriage bonds with disbelieving women..."

(Qur'ân: Al-Mumtahinah: 10)

In this case, the man has to pay her half the dowry, as the rescindment of marriage is on his part.

In this connection, if one of the two disbelieving spouses, who are neither Christians nor Jews, converts to Islam, or if a disbelieving woman converts to Islam after the consummation of her marriage to a disbeliever, the matter becomes dependent on the wife's waiting period. In other words, if one of them converts to Islam during the wife's waiting period, their marriage is to be maintained as valid. However, if the other spouse does not convert to Islam during that period, their marriage is deemed invalid since one spouse has converted to Islam.

In addition, he who converts to Islam while having more than four wives who have converted to Islam too, or who are Christians or Jews, has to choose only four of them to keep as wives. This is based on the fact that when Qays Ibnul-Ḫârith converted to Islam while having eight wives, the Prophet (PBUH) said to him, *"Select four (wives to keep) of them."*[5] The Prophet (PBUH) said the same to others on similar occasions. And, Allah knows best.

Endnotes

1 *Ẕihâr* is the saying of a husband to his wife, when he wants to abstain from having sex with her, "(Sexually,) you are to me like the back of my mother," i.e. unlawful to approach sexually. That was a type of divorce practiced by Arabs in the Pre-Islamic Period of Ignorance (the *Jâhiliyyah*).

2 *Îlâ'*: The potent husband's oath not to have sexual intercourse with his wife for a certain period.

3 See "*Al-Ikhtiyârât Al-Fiqhiyyah*" [322-323].

4 Al-Bukhârî (3157) [6/309].

5 At-Timidhî (1130) [3/435] and Ibn Mâjah (1953) [2/464].

CHAPTER

9

Dowry

Juristically, the word dowry refers to a kind of compensation specified in the marriage contract or after concluding it, and it is to be paid by the husband. As for its ruling, it is obligatory according to the Qur'ān, the *Sunnah* (Prophetic Tradition) and the consensus of Muslim scholars. Allah, Exalted be He, says:

> ***"And give the women [upon marriage] their [bridal] gifts graciously. But if they give up willingly to you anything of it, then take it in satisfaction and ease."*** (Qur'ān: An-Nisā': 4)

Moreover, the Prophet (PBUH) never let a marriage be consummated in his lifetime without a dowry. In this regard, he (PBUH) said to a suitor:

> *"Find something (to give the bride as a dowry), even if it is an iron ring."*[1]

In addition, all Muslim scholars uniformly agree on its legality.

As for the legal amount of dowry, it has no specific minimum or maximum. Whatever is valid to be given as a price or a wage is valid to be given as a dowry, regardless of its amount. Still, we should follow the example of the Prophet (PBUH) regarding dowries, verifying that a dowry should be about four hundred dirhams[2] of silver, like the dowries given to the daughters of the Prophet (PBUH)[3].

Shaykhul-Islâm Ibn Taymiyah (may Allah have mercy on him) said:

> *"If the dowry given is much, it is not deemed detestable as long as the groom is able to afford it, unless the large amount of dowry is offered for detestable purposes, such as boastfulness, showing off, and the like. However, if the groom is unable to afford such a large dowry, it is detestable for him to present it. Moreover, such a matter is viewed prohibited if the dowry cannot be attained except through begging or suchlike prohibited means. If the amount of dowry is much and it is deferred to be paid later, it should be deemed detestable also due to the difficulty caused to the groom by the liability burdened."*[4]

In brief, giving a large amount of dowry is not deemed detestable as long as it is not out of boastfulness and extravagance, and it does not burden the groom causing him to ask others for financial help and suchlike. In addition, a large amount of dowry is not deemed detestable so long as it does not burden the groom with heavy debts. These are valuable regulations and criteria that ensure well-being and eliminate harm.

According to the above, it becomes evident that exaggeration, excessiveness, and extravagance in demanding large dowries are undoubtedly deemed detestable or even prohibited. This is because demanding such large dowries does not consider the condition of poor men, and so it has become a major obstacle in the way of marriage. In addition, there are many other unnecessary marital expenses such as the purchase of expensive clothes and jewelries, holding expensive wedding receptions and banquets, etc. In fact, such matters involve nothing but lavishness, extravagance, and wastefulness, as they are void of any benefit to any of the spouses. Undoubtedly, such matters are considered among the burdens, obstacles, and bad traditions that must be avoided and eliminated to clear the obstacles standing in the way of marriage.

In this connection, 'Â'ishah (may Allah be pleased with her) narrated that the Prophet (PBUH) said:

> *"The most blessed of women are those with less expenditure (in dowries, marriage, living, etc.)."*[5]
>
> (Related by Ahmad, Al-Bayhaqi, Al-Hakim and others)

Moreover, 'Umar Ibnul-Khattâb (may Allah be pleased with him) said:

> *"Do not go to extremes concerning the dowries of women, for if it represented honor in this world and piety in the Sight of Allah, the one of you most entitled to do so would have been the Messenger of Allah (PBUH). He (PBUH) did not marry any of his wives or conclude the marriage of any of his daughters for more than twelve ûqiyyahs[6]. Verily, the man might be overburdened with the dowry of his wife until there could be an enmity toward her in his heart and he would say, 'I have been demanded to get (everything even) the hanger of water skin"*[7]
>
> (Related by An-Nasâ'î and Abû Dâwûd)

In fact, extravagance in dowries may drive the husband to dislike his wife whenever he recalls the huge amount of dowry he had to give to her. Therefore the most blessed of women are those with less expenditure (in dowries, marriage, living, etc).

This is as in the Prophetic *hadîth* narrated by 'Â'ishah. Accordingly, simplicity and easiness in dowries result in the wives being blessed and endear them to their husbands.

The legal purpose behind the legality of the dowry stated for marriage is that it is considered a compensation given to the woman due to the husband's sexual intercourse with her. In addition, the dowry is considered a sign of honor granted to the wife showing that she is respected and highly esteemed by her husband.

It is desirable to specify and state the amount of dowry in the marriage contract to avoid any possible dispute that might arise. Nevertheless, it is permissible to specify and state it later, after concluding the marriage contract, for Allah, Exalted be He, says:

> ***"There is no blame upon you if you divorce women you have not touched nor specified for them an obligation..."***
>
> (Qur'ân: Al-Baqarah: 236)

This verse indicates that the dowry can be deferred and stated later after the marriage.

As regards the quality and nature of the dowry, it is obvious that whatever is permissible to be given as a price, a wage, or a rent, is permissible to be offered as a dowry. Thus, a dowry can be a kind of property, a debt owed by the

groom (whether it is deferred or to be paid in advance), or any specific service offered by the groom. This indicates that the dowry needs to be simplified and made obtainable in accordance with the groom's conditions and financial state, so as to make marriage attainable due to the great benefits of marriage to both individuals and communities.

Some Important Issues Relating to the Dowry

First: The dowry belongs to the woman, and the guardian does not have the right to claim it, except for what she willingly permits him to take. This is because Allah, Exalted be He, says:

"And give the women [upon marriage] their [bridal] gifts graciously..." (Qur'ân: An-Nisâ': 4)

Yet, the bride's father, in particular, is entitled to take from her dowry, even without her permission, provided it does neither affect her basic needs or cause her any harm. The Prophet (PBUH) once said:

"You and your property belong to your father."

Second: The initial stage of the woman's possession of her dowry begins with the conclusion of the marriage contract, the same as in selling. However, her complete possession of it becomes due by the consummation of the marriage (i.e. the husband's having sexual intercourse with her), the husband staying privately with her, or by the death of any of them.

Third: If the husband divorces his wife before consummating the marriage (i.e. copulating with her) or staying privately with her, and he has specified a dowry for her, then she is entitled to get half the dowry. This is because Allah, Exalted be He, says:

"And if you divorce them before you have touched them and you have already specified for them an obligation, then [give] half of what you specified..." (Qur'ân: Al-Baqarah: 237)

So, in case of divorce, both of them are entitled to get half of the specified dowry. In addition, it is permissible for any of them to give up his/her eligible half willingly to the other while being in full possession of it, for Allah, Exalted be He, says:

"...unless they forego the right or the one in whose hand is the marriage contract foregoes it..." (Qur'ân: Al-Baqarah: 237)

Further, Allah, Exalted be He, shows the virtue and desirability of such act saying:

"...And to forego it is nearer to righteousness. And do not forget graciousness between you..." (Qur'ân: Al-Baqarah: 237)

Thus, Allah, Exalted be He, commands each of the separated couple to maintain graciousness through giving up willingly his/her right of half of the dowry to the other. This is a Divine instruction for both divorced couple to forget any hard feelings between them and to show tolerance toward each other due to the sacred relationship that once united them.

Fourth: All that is taken by the wife's father or brother from the husband, such as clothes and the like, is regarded as part of the dowry.

Fifth: If the dowry given by the husband is represented by ill-gotten or prohibited money, the marriage is still deemed valid. However, a proper lawful dowry like that given to ones like her is to be specified instead of the prohibited one.

Sixth: If the marriage contract is concluded without stating a dowry for the woman, the marriage is still deemed valid, and this case is called the marriage of *tafwîd* (i.e. the marriage in which there is no dowry specified). In such a case, a proper dowry like that given to ones like her must be estimated and given to the woman, for Allah, Exalted be He, says:

"There is no blame upon you if you divorce women you have not touched nor specified for them an obligation..."

(Qur'ân: Al-Baqarah: 236)

In addition, when Ibn Mas'ûd (may Allah be pleased with him) was asked about the ruling on a man who married a woman and did not specify a dowry for her and he did not copulate with her until his death, he said:

"She is entitled to get a proper dowry like that given to ones like her, neither more nor less. Moreover, her duty is to observe her waiting period and her right is to get her prescribed share in inheritance." Ma'qil Ibn Sinân said to him, 'The Messenger of Allah (PBUH) gave the same judgment in the case of Birwa' Bint Wâshiq.' "[3]

(Related by At-Tirmidhî and other compilers of *Hadîth*, and At-Tirmidhî deemed it a *sahîh* (authentic) *hadîth*)

With regard to the dowry, *tafwid* may also refer to the amount of dowry specified by either the bride's guardian or the groom, or even by a third party. In such a case, the marriage contract is deemed valid, and if there is a disagreement concerning the amount of dowry, the woman is to be given a dowry like that given to ones like her, estimated by the judge (arbitrator or the one in authority). The judge is to estimate and specify for her a dowry similar to that given to her relatives who have similar qualities to hers, such as her mother, or her maternal or paternal aunt. That is to say, the judge is to consider those who are similar to the woman among her relatives, with regard to wealth, beauty, reason, manners, age, and virginity or being previously married, etc. If the woman does not have any relatives, she is to be given a dowry like that given to ones like her in her town.

In this connection, if the husband divorces his wife before consummating the marriage (i.e. copulating with her), she is entitled to receive a special compensation whose value is dependent on the husband's financial state. Allah, Exalted be He, says:

"There is no blame upon you if you divorce women you have not touched nor specified for them an obligation. But give them [a gift of] compensation – the wealthy according to his capability and the poor according to his capability – a provision according to what is acceptable, a duty upon the doers of good."

(Qur'ân: Al-Baqarah: 236)

The Divine command in the aforementioned verse indicates the obligation of giving the divorced woman compensation in such a case, and shows that fulfilling such an obligation is among the good, righteous deeds.

Back to the issue of unspecified dowries, if the separation occurs due to the death of any of the two spouses before the consummation of the marriage, a dowry like that given to ones like the wife is to be stated and inherited by the other spouse (i.e. the one who is alive). This is because the non-specification of the dowry does not affect the validity of marriage; this opinion is supported by the above-mentioned judgment delivered by Ibn Mas`ûd.

On the other hand, if the marriage is consummated or the spouses have stayed privately together, the wife is entitled to receive a dowry like that given to ones like her. This is supported by the opinion of Imâm

Ahmad as well as other judgments issued by the Rightly-guided Caliphs, in which they judged that if the door (of a room where the married couple are) is closed or a screen is lowered (i.e. marriage is deemed consummated), then the dowry must be paid[9].

If the separation is the wife's choice, and it occurs before the consummation of the marriage, she does not have the right to claim anything of the dowry. This is just like the case when the wife reneges on Islam or rescinds the marriage contract due to a certain defect in the husband; she does not have the right to claim her dowry in such cases.

Seventh: Before the consummation of the marriage, the wife has the right to abstain from having sexual intercourse with her husband until she gets her due dowry. This is because if she gives herself sexually to her husband willingly and then she wants to hold herself back again until she gets her dowry, she will not be able to get it. On the other hand, if the dowry has already been agreed to be deferred, she does not have the right to abstain from having sexual intercourse with her husband, as she has consented to receive her dowry later from the very beginning. Likewise, the wife is not entitled to abstain from having sexual intercourse with her husband until she gets her dowry, if she has already had sexual intercourse with him.

Endnotes

1 Al-Bukhârî (5078) [9/164] and Muslim (4372) [5/215].
2 A dirham of silver equals 2.975 grams of silver.
3 Muslim (3474) [5/218].
4 See: *"Al-Ikhtiyarât Al-Fiqhiyyah"* [p. 327].
5 Ahmad (24999) [6/145], Al-Bayhaqî (14356) [7/384], and Al-Hâkim (2791) [2/213].
6 An ûqiyyah equals forty dirhams of silver, i.e. 119 grams of silver (as a dirham of silver equals 2.975 grams of silver).
7 Abû Dâwûd (2106) [2/402], At-Tirmidhî (1116) [3/422], and An-Nasâ'î (3349) [3/427].
8 Abû Dâwûd (2114) [2/406], At-Tirmidhî (1147) [3/450], An-Nasâ'î (3354) [3/430] and Ibn Mâjah (1891) [2/434].
9 Al-Bayhaqî (14484) [7/417].

CHAPTER

10

Wedding Feast (*Walîmah*)

The wedding feast is a large meal for many people held on the occasion of marriage.

The Ruling on Wedding Feasts

Holding a wedding banquet is an act of the *Sunnah* (Prophetic Tradition) according to the unanimous agreement of Muslim scholars. Some scholars maintain that it is obligatory due to the command of the Prophet (PBUH) and that one is obliged to attend it when invited. To illustrate, the Prophet (PBUH) said to `Abdur-Rahmân Ibn `Awf (may Allah be pleased with him) when the latter informed the Prophet of his marriage, *"Hold a wedding feast even if by (offering) one sheep."*[1] (Related by Al-Bûkhârî and Muslim) Moreover, the Prophet (PBUH) himself offered a wedding feast when he married his wives Zaynab,[2] Safiyyah,[3] and Maymûnah Bintul-Hârith.

The time for offering a wedding feast extends from the time of concluding the marriage contract until the end of the wedding days; it can be held within this period. As for the amount of food offered in a wedding feast, some *faqīhs* view that it is not to be less than one sheep and that the more the better. They base their opinion on the above-mentioned *hadīth* in which the Prophet (PBUH) said to `Abdur-Rahmān Ibn `Awf, *"Hold a wedding feast even if by (offering) one sheep."* This is to be done when one is able to afford it; otherwise, the wedding feast is to be held according to one's financial capability. For example, the Prophet (PBUH) held a wedding feast of *hays* (a cooked food consisting of flour, cooking fat, and cheese) when he (PBUH) married Safiyyah. This indicates that a wedding feast is sufficient to be held without slaughtering a sheep.

Extravagance in offering wedding feasts is impermissible. However, people nowadays offer lots of sheep, camels, and different kinds of foods, out of lavishness and excessiveness. Such extravagance causes a huge amount of food to be left uneaten and thrown into rubbish bins, and thus money is just wasted in vain, which is forbidden by our *Sharī`ah* (Islamic Law) and rejected by reason. Those who hold such lavish wedding feasts as well as those satisfied with them are liable to divine punishment and deprivation of blessing. Besides, such luxurious wedding feasts may contain illegal kinds of amusements and meetings that usually lead to sinfulness. They may also be held in hotels where women may not pay much attention to their decency and modesty and mingle freely and shamelessly with men, which may lead to disastrous consequences. Furthermore, such wedding banquets nowadays may involve corruptive songs and music, as well as dissolute singers and photographers. In addition, lots of money is being spent and wasted on such celebrations uselessly and, rather, corruptively, leading to nothing but dissolution. Therefore, those who held such corrupt banquets must fear Allah and beware of His punishment. Allah, Exalted be He, says:

> ***"And how many a city have We destroyed that was insolent in its [way of] living..."*** (Qur'ān: Al-Qasas: 58)

Allah also says:

> ***"...and eat and drink, but be not excessive. Indeed, He likes not those who commit excess."*** (Qur'ān: Al-A`rāf: 31)

Moreover, Allah, Exalted be He, says:

> ***"...Eat and drink from the provision of Allah, and do not commit abuse on the earth, spreading corruption."***
>
> (Qur'ān: Al-Baqarah: 60)

There are so many known verses with regard to this issue.

It is obligatory for whoever is invited to a wedding feast to attend, provided it meets the following conditions:

1) The wedding feast one is invited to must be the first one held on the occasion of that marriage. If it is repeated on the occasion of the same marriage, one is not obligated to attend more than the first one. The Prophet (PBUH) said:

   "Holding a wedding feast on the first day (of the wedding) is a duty, on the second day is a good practice, but on the third day is a sign of hypocrisy and ostentation."[4]

   (Related by Abû Dâwûd and others)

   Sheikh Taqiyyud-Dîn said:

   "It is prohibited to offer food and slaughter animals extravagantly (as a wedding feast) on the rest of the wedding days (i.e. other than the first one), even if it is a custom or a means of spreading joy among one's people. If one holds it repeatedly (after the first day), one is to be discretionarily punished."[5]

2) The host must be a Muslim.

3) The host must not be one of those manifestly and shamelessly disobedient to Allah, for such people must be avoided and deserted.

4) The invitee must be personally invited, i.e. it is not to be just an open general invitation.

5) The wedding feast one is invited to must be void of anything unlawful, such as intoxicants, singers or songs, music, etc., as happens in some wedding banquets nowadays.

If these conditions are met, the invitee should attend the wedding feast, for the Prophet (PBUH) said:

> *"The worst kind of food is that of the wedding feast, to which are invited those ignoring it (i.e. the rich) and from which are forbidden those keen on coming to it (i.e. the poor). He who does not respond to the invitation (of the wedding feast) has disobeyed Allah and His Messenger."*[6]
>
> (Related by Imâm Muslim)

It is an act of the *Sunnah* to publicly announce the marriage, for the Prophet (PBUH) said:

"Make marriage publicly known."[7]

Ibn Mâjah related it in the following wording:

"Make marriage publicly announced."

Moreover, it is considered an act of the *Sunnah* to celebrate it by beating *duffs* (Arab musical instrument similar to a tambourine, but without metal jingling disks). The Prophet (PBUH) said:

"The distinction between what is lawful and what is prohibited (while celebrating a wedding) is (the permissibility of) the voices (of people while making the marriage publicly known) and the duff at the marriage (ceremony)."[8]

(Related by An-Nasâ'i, Ahmad, and At-Tirmidhî who deemed it a *hasan* (good) *hadîth*)

Endnotes

1 Al-Bukhârî (5155) [9/276] and Muslim (3475) [5/218].
2 Al-Bukhârî (4791) [8/669] and Muslim (3491) [5/231].
3 Al-Bukhârî (371) [1/621] and Muslim (3482) [5/221].
4 Abû Dâwûd (3745) [4/83] and Ibn Mâjah (1915) [2/445].
5 See the footnote in *Ar-Rawd Al-Murbi'* [408-409].
6 Muslim (3511) [5/239] and Al-Bukhârî (5177) [9/304].
7 At-Tirmidhî (1090) [3/398] and Ibn Mâjah (1895) [2/436].
8 At-Tirmidhî (1089) [3/398], An-Nasâ'i (3369) [3/437], and Ibn Mâjah (1896) [2/437].

CHAPTER

11

Husband-Wife Relationship

The husband-wife relationship refers to the relationship between the married partners, which should be based on kindness and intimacy. Each of the two spouses must live kindly and faithfully with the other; none of them should withhold the other's rights, have an aversion to fulfilling any of them, or give the other his/her rights but follow it with injury or reminders of favor and generosity. Allah, Exalted be He, commands husbands to be kind to their wives; Allah says:

> *...And live with them in kindness..."* (Qur'ân: An-Nisâ': 19)

Allah, Exalted be He, also says:

> *"...And due to them [i.e. the wives] is similar to what is expected of them, according to what is reasonable..."*
>
> (Qur'ân: Al-Baqarah: 228)

Moreover, the Prophet (PBUH) said:

"The best amongst you is the one who treats his family best."[1]

He (PBUH) also said:

"If I were to command anyone to prostrate to another, I would command a woman to prostrate herself before her husband due to the greatness of his right over her."[2]

Furthermore, the Prophet (PBUH) said:

"If a woman spends the night deserting her husband's bed, the angels keep sending their curses on her until morning."[3]

It is an act of the *Sunnah* (Prophetic Tradition) that each of the two spouses should treat the other clemently, show good manners towards the other, and be tolerant concerning the harm caused by the other. Allah, Exalted be He, says:

"...and to parents do good, and to... the companion at your side..." (Qur'ân: An-Nisâ': 36)

It is viewed that the word "companion" in the aforementioned verse refers to each of the two spouses. Similarly, the Prophet (PBUH) said:

"Treat women kindly, as they are (like) captives in your houses."

In this connection, the husband should keep the bond of marriage even if he dislikes his wife. This is because Allah, Exalted be He, says:

"...And live with them in kindness. For if you dislike them-perhaps you dislike a thing and Allah makes therein much good." (Qur'ân: An-Nisâ': 19)

In his interpretation of this noble verse, Ibn 'Abbâs (may Allah be pleased with him) said:

"The one who dislikes his wife may beget a child from her and that Allah may make the child a means of much good."[4]

It is also related as a *sahih* (authentic) *hadith* that the Prophet (PBUH) said:

"A believing man should not hate a believing woman (i.e. his wife); if he dislikes one of her qualities, he will be pleased with another."[5]

It is prohibited for any of the two spouses to withhold any of the other's due rights, or to have an aversion to fulfilling it.

If the marriage contract is concluded, the wife, who is mature enough for the consummation of marriage, is to be given to her husband in his house, if he so desires, unless she has made a condition in the marriage contract that she will remain in her house or in her town.

It is permissible for the husband to take his wife along with him when he travels as long as such a journey involves neither disobedience to Allah nor any danger. This is based on the fact that the Prophet (PBUH) and his Companions used to take their wives along with them when they traveled. However, most of today journeys are made to disbelieving countries, which patronize corruption, licentiousness, and dissoluteness. Hence, it is impermissible to travel to such countries just for tourism and having fun, for such journeys greatly threaten one's religion as well as one's manners. Moreover, the woman herself and her guardians should refuse her traveling with her husband to such countries.

There is a common practice innovated by the wealthy newlyweds; they travel on the second morning of the wedding to such disbelieving countries in order to spend their so-called honeymoon. In fact, it is more appropriate to call it the evil month, as it involves committing prohibited deeds, such as taking off the Islamic veil, putting on clothes similar to those of the disbelievers' as well as witnessing their bad traditions and deeds, and visiting places of immorality. As a result, the Muslim women may return to their homes affected by such evil traditions desiring to imitate them and renounce those of the Islamic community. Hence, such journeys are by all means prohibited, and those who make them should be reproved and prevented from doing so. Moreover, the woman's guardians are to prevent her from traveling with her husband to such countries and rid her of such a heedless husband, as she is considered a trust that the guardians should preserve. Even if the woman herself agrees to travel with her husband to such countries, she may be unaware of her interest and mindless of the consequences of such travels. That is why there are persons to control and observe her interests, namely her guardians, and preventing her from such acts is one of their duties.

As for sexual intercourse, the husband is prohibited to copulate with his wife in her menses, for Allah, Exalted be He, says:

> ***"And they ask you about menstruation. Say, 'It is harm, so keep away from wives during menstruation. And do not approach them until they are pure. And when they have purified themselves, then come to them from where Allah has ordained for you. Indeed,***

Allah loves those who are constantly repentant and loves those who purify themselves.' " (Qur'ân: Al-Baqarah: 222)

In addition, it is permissible for the husband to force his wife to wash herself to remove dirt, to shave undesirable hair in her body, and to clip long dirty nails. He can also prevent her from eating whatever causes a bad smell in the mouth, as such matters cause the husband's aversion. Moreover, it is permissible for the husband to force his wife to take a ritual bath to remove her state of major ritual impurity, and to observe the Five Prayers. If the wife refuses to observe them, he is to oblige and discipline her. After that, if she insists on her refusal of observing prayer, it becomes prohibited for the husband to continue living with her. Thus, the husband should force his wife to give up and avoid whatever is prohibited, for Allah, Exalted be He, says:

"Men are in charge of women by [right of] what [qualities] Allah has given one over the other..." (Qur'ân: An-Nisâ': 34)

Allah, Exalted be He, also says:

"O you who have believed, protect yourselves and your families from a Fire whose fuel is people and stones, over which are [appointed] angels, harsh and severe; they do not disobey Allah in what He commands them but do what they are commanded."

(Qur'ân: At-Tahrîm: 6)

Moreover, Allah says:

"And enjoin prayer upon your family [and people] and be steadfast therein. We ask you not for provision; We provide for you, and the [best] outcome is for [those of] righteousness."

(Qur'ân: Tâhâ: 132)

Allah also praised His Prophet Ismâ'il (Ishmael) (PBUH) saying:

"And mention in the Book, Ishmael. Indeed, he was true to his promise, and he was a messenger and a prophet. And he used to enjoin on his people prayer and Zakâh..."

(Qur'ân: Maryam: 54-55)

Thus, the husband is responsible for the righteousness, religiousness and manners of his wife, as she is the one who raises his children and leads the family as well. Hence, if she is corrupt and negligent of her religion, she will surely cause the corruption of his children and his family. Accordingly, Muslims should fear Allah with regard to their wives and observe their conduct, as the Prophet (PBUH) said, "*Treat women kindly.*"

The husband is required to spend one of every four nights with his wife, provided she is a free woman, if she asks him to do so. This is because he cannot marry but three other women besides her, and has to spend a night with each in this case. This is based on the fact that Ka`b Ibn Siwâr passed such a judgment during the Caliphate of `Umar Ibnul-Khattâb (may Allah be pleased with him) and it was such a well-known judgment that it was met with approval and none contradicted it. It is also the opinion adopted by some *faqihs*, and what is mentioned above shows its proof and the principle on which it is based. However, Sheikh Taqiyyud-Dîn has a different view in this regard; he says that the case of being married to one woman differs from that of being married to four concerning the ruling on the number of nights spent with one's wife/wives. And, Allah knows best.

It is obligatory for the potent husband to have sexual intercourse with his wife, if she asks him to do, at least once every four months. This is because Allah, Exalted be He, decreed that the maximum period for a husband who swears not to have sexual intercourse with his wife is four months; so scholars apply this ruling on other cases of men. Yet, Shaykhul-Islâm Ibn Taymiyah views that having sexual intercourse with one's wife is obligatory according to the wife's satisfaction, and that it is not restricted to a certain period, as long as it does not cause harm to the husband or keep him from seeking provision.

In this connection, if the husband has been abroad for more than six months and his wife asks him to come back, the husband is obligated to do so, unless he is performing an obligatory *Hajj* (pilgrimage), or participating in *jihâd* (fighting in the Cause of Allah), or excusably unable to come back. But if he refuses to come back without having any excuse preventing him from coming back, and so she asks for separation, the judge (or the one in authority) is to separate them after informing the husband. This is because the husband has neglected one of the wife's rights, which causes her harm.

Sheikh Taqiyyud-Dîn said:

> *"The harm caused to the wife by the husband when he does not have sexual intercourse with her necessitates the invalidation of the marriage contract. This is to be applied whatever the case may be, whether it is intended by the husband or not, and whether he is potent or not, just like the ruling on maintenance, but rather worthier."*[6]

It is prohibited for each of the two spouses to tell others about their private matters related to their sexual intercourse. This is because the Prophet (PBUH) said:

> *"Verily, among the most wicked of people in the Sight of Allah on the Day of Resurrection is the man who has sexual relations with his wife and then he divulges her (sexual) secrets."*[7]
>
> (Related by Imâm Muslim)

This *hadîth* is regarded as a proof of the prohibition of divulging the secrets of their sexual relations, whether they are words or actions.

It is for the husband to prevent his wife from going out of the house unnecessarily. He should not let her go wherever she likes without his permission. Moreover, it is prohibited for the wife to go out of the house without the permission of her husband, unless necessary. On the other hand, it is desirable for the husband to grant his wife permission to go out to nurse her legally unmarriageable relatives, such as her brother or uncle, for this involves maintaining the ties of kinship. Furthermore, the husband is not entitled to prevent his wife's parents from visiting her at home, unless he fears that they may turn her against him whenever they come to visit her. In this case, it is for the husband to prevent them from visiting her.

The husband is also entitled to prevent his wife from being hired or employed, as he is supposed to provide for her and to meet all her needs. This is also because being hired or employed makes the wife too busy to fully observe her husband's rights or to look after her children. Work may also expose the wife to immoral situations, especially nowadays, when decency and morality have become rare whereas dissoluteness and immorality are widespread. In other words, women nowadays mingle with men in offices and workplaces involving prohibited privacy, which is a great moral danger that undoubtedly must be avoided.

Furthermore, it is for the husband to prevent his wife from breastfeeding her baby from a former husband unless necessary. In addition, the wife is not to obey her parents when they ask her to separate from her husband, nor should she obey them when they ask her to visit them if her husband disagrees. This is because her obedience to her husband is worthier than that to her parents. To illustrate, it is narrated that the paternal aunt of Husayn came to the Prophet (PBUH) and he asked her:

"Do you have a husband?" When she replied in the affirmative, he (PBUH) said to her, "See your status with him (i.e. whether you try to satisfy him or not), for he is your paradise and your fire (i.e. your entering either Paradise or Hell-fire can be dependent on the way you treat him)."[8]

If the husband has more than one wife, it is obligatory for him to treat them as equals and to divide the time he spends with them justly. Allah, Exalted be He, says:

"...And live with them in kindness..." (Qur'ān: An-Nisā': 19)

Allah, Exalted be He, also says:

"...So do not incline completely [toward one] and leave another hanging..." (Qur'ān: An-Nisā': 129)

This means that when the husband favors one of his wives over the other, it makes the other as if suspended or "hanging", for she has a husband and does not have him at the same time. In this regard, the equal treatment the husband gives each is mainly based on his just division of the nights he spends with them. This is because the night is the time when a man goes back home, finds tranquility with his family, and generally goes to bed with his wife. As for those who mainly work at night, such as security guards and the like, they are to divide daytimes among their wives, as daytime for them is regarded as night for others.

Moreover, even if one of one's wives is in her puerperium or menstrual period or she is sick, she is still entitled to have her equal share of one's time. This is because the husband's presence with his wife creates intimacy and affection between them, even if without having sexual intercourse.

In addition, it is not for the husband to set the order of his wives in his schedule according to his own desire. Rather, it is to be done by means of drawing lots or by the consent of all his wives. This is because placing a certain wife first in the husband's schedule means that he favors her over the others, while it is obligatory for him to treat them all as equals.

On the other hand, the husband is not entitled to take one of his wives along with him on a journey and leave the others, unless he draws lots among them or all his wives give their consent. This is based on the fact that whenever the Prophet (PBUH) intended to go on a journey, he drew lots among his wives and took with him the one upon whom the lot fell[9].

Endnotes

1 At-Tirmidhî (3904) [5/709] and Ibn Mâjah (1977) [2/478].
2 At-Tirmidhi (1161) [3/465].
3 Al-Bukhâri (5194) [9/365] and Muslim (3524) [5/248].
4 See Ibn Jarîr At-Tabarî and Ibn Abû Hâtim in their books on *Tafsir.*
5 Muslim (3633) [5/299].
6 See the footnote in "*Ar-Rawd Al-Murbi'* " [6/438].
7 Muslim (3527) [5/249].
8 Ibn Abû Shaybah (17119) [3/552] and Al-Bayhaqî (14706) [7/476].
9 Al-Bukhâri (5211) [9/385] and Muslim (6248) [8/205].

CHAPTER

12

Matters Nullifying Wife's Right of Expenses and Share of Nights

If the wife travels without the permission of her husband, or with his permission but to fulfill something for herself, her right of expenses and her share of her husband's time (in case she is not his only wife) drop. This is because when the wife travels without her husband's permission, she is regarded as a disobedient, recalcitrant wife. On the other hand, if she travels with the permission of her husband but just to observe her own interest, it becomes unattainable for him to enjoy her due to her personal reason. The same ruling applies when the husband wishes to take his wife along with him on a journey and she refuses; she does not have any right of expenses or share of her husband's allotment of nights in this case, as she is considered a disobedient wife. Likewise, if the wife refuses to go to bed with her husband, her right of expenses and her share of nights are nullified, as she becomes as disobedient as a recalcitrant wife.

It is prohibited for the husband to have sexual intercourse with one of his wives on a night or a day which is not hers unless necessary.

On the other hand, it is permissible for one of the husband's wives to give up her share of the nights allotted by the husband, after taking his permission, to her fellow wife. This is because the nights allotted are among the wives' rights, in addition to the fact that both wives agree to such a deal. To illustrate, Sawdah (one of the Prophet's wives, may Allah be pleased with her) gave her night to her fellow wife 'Â'ishah (may Allah be pleased with her) so that the Prophet (PBUH) used to spend with 'Â'ishah both her night and that of Sawdah[1]. However, if the wife who has given her share of nights to another claims her share back, the husband is to comply with her request.

Moreover, it is permissible for the wife to give up her right of expenses and share of nights for the purpose of making the husband keep her as a wife. Allah, Exalted be He, says:

> ***"And if a woman fears from her husband contempt or evasion, there is no sin upon them if they make terms of settlement between them – and settlement is best..."***
>
> (Qur'ân: An-Nisâ': 128)

With regard to the aforementioned verse, 'Â'ishah said:

> *"It concerns the woman whose husband does not want to keep her with him any longer, but he wants to divorce her. So, she says to him, 'Keep me and do not divorce me, and I give up my right of expenses and my share of nights.'"*[2]

In addition, when Sawdah grew old and feared that the Messenger of Allah (PBUH) may leave her, she said:

> *"I give my night (i.e. the night the Prophet spends with her) to 'Â'ishah."*[3]

It is important to point out that if one marries a virgin while having other wives, one should spend the first seven nights with her and then by turns, without deducting those seven nights from her share afterwards. However, if such a man marries a woman who has been previously married (i.e. not a virgin), he should spend the first three nights with her and then by turns, without deducting those three nights from her share afterwards. This is because Al-Bukhârî and Muslim related:

> *"Abû Qilâbah narrated on the authority of Anas (may Allah be pleased with him), 'It is an act of the Sunnah (Prophetic Tradition) that if a man marries a virgin and he has already a wife who has*

been previously married (i.e. not a virgin), then he should spend the first seven nights with her (i.e. the virgin) and then by turns. And if a man marries a woman who has been previously married, then he should spend the first three nights with her, and then by turns.' Abû Qilâbah commented, 'If I wished, I would have said that Anas ascribed this hadîth to the Prophet (PBUH).' "[4]

(Related by Al-Bukhârî and Muslim)

Still, if the man's bride who has been previously married (i.e. not a virgin) asks him to spend with her the first seven nights instead of three, he should comply. Yet, he has to spend the same number of nights with his other wives. After that, he is to apportion nights among them all, one night for each by turns. This is because when the Prophet (PBUH) married Umm Salamah who had been previously married, i.e. she was not virgin then, he (PBUH) said to her:

"There is no lack of estimation for you on the part of your husband (i.e. himself). So, if you wish, I can stay with you for seven nights, but in case I do, I shall have also to spend seven nights with each of my wives afterwards."[5]

(Related by Ahmad, Muslim, and other compilers of *Hadîth*)

One of the relevant issues in this connection is the wife's disobedience, recalcitrance, arrogance, or violation of her marital duties towards her husband. In this respect, it is prohibited for the wife to disobey her husband unjustifiably. For example, a husband may notice that his wife shows disapproval of having sexual intercourse with him or slackens when he asks her to. In this case, the husband is to admonish her and remind her of Allah's punishment, of his rights over her as a husband, and of the sin of not fulfilling her marital duties towards him. If she persists in disobeying him despite his admonishment, he should sexually forsake her in bed and stop speaking to her for three days. After that, if she still disobeys him, he should discipline her by beating her but not violently, i.e. in a way that does not cause her injury. This is because Allah, Exalted be He, says:

"...But those [wives] from whom you fear arrogance – [first] advise them; [then if they persist], forsake them in bed; and [finally], strike them..." (Qur'ân: An-Nisâ': 34)

In this connection, if each of the two spouses claims the injustice of the other and there is no way to reconcile them, the judge (or the one in authority) should seek the intervention of two equitable arbitrators of their families to

reconcile them. This is because relatives are supposed to be more acquainted with the actual reasons behind the couple's dispute and more honest and keen for their best interest. Those two arbitrators should have the intention of reconciling between the two spouses, for Allah, Exalted be He, says:

> ***"And if you fear dissension between the two, send an arbitrator from his people and an arbitrator from her people. If they both desire reconciliation, Allah will cause it between them. Indeed, Allah is Ever-Knowing and Acquainted [with all things]."***
>
> (Qur'ân: An-Nisâ': 35)

The two arbitrators should do their best to bring about reconciliation and agreement between the married couple. However, if they are unable to achieve it, they may separate between them justly, be it with or without compensation. At any rate, whatever the arbitrators decide should be complied with in order to resolve the dispute. And, Allah knows best.

Endnotes

1 Al-Bukhâri (5212) [9/387] and Muslim (3614) [5/289].
2 Al-Bukhâri (4601) [8/335) and Muslim (3021).
3 Abû Dâwûd (2135) [2/416].
4 Al-Bukhâri (5214) [9/389] and Muslim (3611) [5/287].
5 Muslim (3606) [5/284], Abû Dâwûd (2122) [2/411], and Ibn Mâjah (1917) [2/446].

VII:DIVORCE

CHAPTER

1

Wife's Release against Payment (*Khul`*)

A wife's release against payment is the wife's separation from her husband in return for remuneration paid to the husband, and it is effected through a certain spoken form. Linguistically, the Arabic word "*khul`*" means taking off something, and this term implies that the wife in this case separates from her husband just like taking off her clothing, since the husband and his wife are referred to in the Qur'ān as clothing for one another due to their closeness, union, and intimacy. Allah, Exalted be He, says:

"...They are clothing for you and you are clothing for them..."

(Qur'ān: Al-Baqarah: 187)

It is well known that marriage is a union between the husband and his wife to live together in kindness, build up a new family, and bring up a new generation. Allah, Exalted be He, says:

> ***"And of His signs is that He created for you from yourselves mates that you may find tranquility in them; and He placed between you affection and mercy..."*** (Qur'ân: Ar-Rûm: 21)

If this noble objective of marriage is not fulfilled, as when there is no mutual affection between the spouses, or when there is no affection of the husband towards his wife, or when their living together becomes unbearable and it is too difficult to settle their disputes, the husband in such cases is obliged to release her kindly. Allah, Exalted be He, says:

> ***"...then [after that], either keep [her] in an acceptable manner or release [her] with good treatment..."***
>
> (Qur'ân: Al-Baqarah: 229)

Allah also says:

> ***"But if they separate [by divorce], Allah will enrich each [of them] from His abundance. And ever is Allah Encompassing and Wise."***
>
> (Qur'ân: An-Nisâ': 130)

However, when the husband loves his wife but she dislikes him, his manners, his appearance, or his lack of religiousness, or fears the sin of not observing his rights, it is permissible for her to ask for separation by ransoming herself through paying him a monetary compensation. Allah, Exalted be He, says:

> ***"...but if you fear that they will not keep [within] the limits of Allah, then there is no blame upon either of them concerning that by which she ransoms herself..."*** (Qur'ân: Al-Baqarah: 229)

This verse means that when any of the two spouses feels that living together results in disputes and violations of one another's rights, or when the wife fears that she may disobey her husband, it is permissible for the wife in this case to take the initiative and ask for her release against payment. Likewise, it is permissible for the husband to accept such remuneration in such cases and to release her.

The wisdom behind ordinance of a wife's release against payment (*khul'*) is to enable the wife to irrevocably separate from her husband, as it is a just settlement for the husband and the wife in cases like the aforementioned ones. It is an act of the *Sunnah* (Prophetic Tradition) for the husband to agree to his wife's request of release. However, if the husband loves his wife, it is desirable for the wife to be patient and not to ask for separation.

The wife's release against payment is permissible when its reason is fulfilled as stated in the aforementioned Qur'anic verse, namely the fear that the two spouses will not keep a good relation within the limits of Allah. However, when there is no need for such separation, it becomes detestable in this case, or even prohibited according to others. This is because the Prophet (PBUH) says:

> *"If any woman asks her husband for divorce without some strong reason, the odor of Paradise will be forbidden to her."*[1]
>
> (Related by the Five Compilers of *Hadîth* except An-Nasâ'î)

In this regard, **Sheikh Taqiyyud-Dîn** said:

> *"When a wife dislikes her husband, the Sunnah permits her to ask for release in return for remuneration and ransom herself from her husband, just as the captive ransoms himself."*[2]

Sometimes, the husband does not like his wife but keeps her so that she may become bored with living with him and may ask him for release for monetary compensation. In this case, the husband is considered unjust to his wife and it is prohibited for him to take such compensation, and the release against payment (*khul'*) becomes invalid. Allah, Exalted be He, says:

> ***"...And do not make difficulties for them in order to take [back] part of what you gave them..."*** (Qur'ân: An-Nisâ': 19)

The meaning of this Qur'anic verse is that the husband must not treat his wife badly to make her give him back all or part of what he has paid as dowry or give up some of her rights. Still, the verse makes an exception as it permits the husband to make difficulties for his wife to get back the dowry he has given her if she is an adulteress; Allah, Exalted be He, says:

> ***"...unless they commit a clear immorality [i.e. adultery]..."***
>
> (Qur'ân: An-Nisâ': 19)

Commenting on the aforementioned verse, Ibn 'Abbâs (may Allah be pleased with him) said:

> *"This verse addresses the man who hates his wife, and makes difficulties for her so that she may ransom herself from him (by release against payment). Allah, Exalted be He, forbade such an act. Yet, Allah then says, '**...unless they commit a clear immorality [i.e. adultery]...**', in which case it is permissible for him (i.e. the husband) to make difficulties for her until she asks for separation and thus he gets back the dowry he has paid her, separating from her in return for getting remuneration."*

Release against payment (*khul`*) is permissible according to the Qur'ân, the *Sunnah* (Prophetic Tradition) and the consensus of scholars, provided there exists a good reason for it. The Qur'anic evidence of the permissibility of release against payment is the aforementioned verse, in which Allah, Exalted be He, says:

> ***"...but if you fear that they will not keep [within] the limits of Allah, then there is no blame upon either of them concerning that by which she ransoms herself..."*** (Qur'ân: Al-Baqarah: 229)

As for the *Sunnah*, the following *hadith*, which is related in the *Sahih* (Authentic Book) of Al-Bukhâri, is a proof of the permissibility of a wife's release in return for remuneration:

> *"The wife of Thâbit Ibn Qays came to the Prophet (PBUH) and said, 'O Messenger of Allah! I do not blame Thâbit for defects in his character or his religion, but I, being a Muslim, dislike behaving in an un-Islamic manner (if I remain with him).' Upon that, the Messenger of Allah (PBUH) said (to her), 'Will you give back the garden which he (Thâbit, the husband) has given you (as dowry)?' She said, 'Yes.' Thereupon, the Messenger of Allah (PBUH) said to him (Thâbit), 'Accept the garden, and divorce her once.' "*[3]

As regards the consensus of Muslim scholars, **Ibn `Abdul-Barr** said:

> *"Al-Muzani is the only scholar who disagrees in this regard (i.e. disagrees on the permissibility of release against payment). He argues that the verse (i.e. the aforementioned one; Al-Baqarah: 229) is abrogated by the following verse in which Allah, Exalted be He, says,* ***'But if you want to replace one wife with another and you have given one of them a great amount [in gifts], do not take [back] from it anything...'*** (Qur'ân: An-Nisâ': 20)"

There are some conditions for the validity of release against payment (*khul`*):

- The monetary compensation must be paid in return by someone who is legally qualified to donate.
- The husband must be legally qualified to divorce.
- If there is no legal reason, the husband must not make difficulties for his wife to get back the dowry he has given her.
- The release against payment (*khul`*) must be done through its legal spoken form.

If it is done through a spoken form of divorce or an implicit form, provided the husband has the intention of divorce, then it is regarded as divorce. In this case, the ruling on release in return for payment (*khul'*) is applied so that the husband is not entitled to take his wife back, but he can remarry her with a new marriage contract, even without she marries and separates from another husband first, provided it (the release in return for payment) has not been preceded by two divorces that make it a threefold irrevocable divorce.

However, if the separation is done through the legal spoken form of a release in return for payment (*khul'*) or its equivalent forms which indicate the cancellation of marriage or the like, provided the husband does not intend it to be a divorce, it is considered a mere cancellation of the marriage contract which does not affect the number of divorces. This is the opinion reported to have been adopted by Ibn 'Abbâs (may Allah be pleased with him). Ibn 'Abbâs based his opinion on the following sequence of verses: Allah, Exalted be He, says, ***"Divorce is twice..."*** (Qur'ân: Al-Baqarah: 229), and then says, ***"...then there is no blame upon either of them concerning that by which she ransoms herself..."*** (Qur'ân: Al-Baqarah: 229) After that, Allah says, ***"...And if he has divorced her [for the third time], then she is not lawful to him afterward until [after] she marries a husband other than him..."*** (Qur'ân: Al-Baqarah: 230) Ibn 'Abbâs argued that Allah mentions two acts of divorce, then an act of the release against payment (*khul'*), then an act of divorce. If the release in return for payment affected the number of divorces, there would be four acts of divorce, not three, which is invalid. And, Allah knows best.

Endnotes

1 Abû Dâwûd (2226) [2/463], At-Tirmidhi (1190) [3/493], and Ibn Mâjah (2055) [2/518].
2 See *Majmu'ul-Fatâwâ* [32/282].
3 Al-Bukhâri (5273) [9/489].

CHAPTER 2

Divorce

Divorce is the dissolution of the bond of marriage or part of it. The ruling on divorce varies according to the different situations. It can be permissible, detestable, desirable, obligatory, or prohibited. So, it can involve any of the main five rulings.

Divorce is **permissible** when the husband needs it because of his wife's ill conduct, the harm caused to him by keeping his wife, and the non-fulfillment of the legal objective of marriage by keeping her.

However, divorce is **detestable** if there is no need for it, as when there is no problem between the married couple; some scholars deem it **prohibited** in such a case. According to the preponderant view, divorce is permissible with detestability in this case, for the Prophet (PBUH) says:

> *"The most detestable lawful act in the Sight of Allah is divorce."*[1]
>
> (Related by Abû Dâwûd and Ibn Mâjah, and the men of its chain of transmitters are trustworthy)

In this *hadith*, the Prophet (PBUH) refers to divorce as lawful though it is detestable in the Sight of Allah, indicating its detestability-based permissibility in this case. The reason for its detestability in this case is that it puts an end to a marriage that fulfills the legally desired interests.

On the other hand, divorce becomes **desirable** if the wife suffers harm during her marital life, such as when there is dissension between her and her husband or when she dislikes him. In this case, maintaining the marriage causes more harm to the wife, while the Prophet (PBUH) says:

> *"One should not harm others nor should one seek benefit for oneself by causing harm to others."*

Divorce becomes **obligatory** for the husband if the wife is neither righteous nor upright on the religious level. For example, the wife may be so negligent in prayer that she abandons it or performs it belatedly, while the husband is unable to rectify her, or she may be morally dishonest. In such cases, it is obligatory for the husband to divorce her according to the preponderant view in this regard. **Ibn Taymiyah** (may Allah have mercy on him) said, *"If the wife commits adultery, it is not for the husband to keep her. Otherwise, he is considered a cuckold."*[2] Similarly, if the husband is neither righteous nor upright concerning religion, it is **obligatory** for the wife to ask for divorce, or separate from him by release against remuneration (*khul'*). It is not for the wife to stay with him as long as he is negligent of his religious duties.

If the husband has sworn not to have sexual intercourse with his wife and then the waiting period of four months passes and he still refuses to do so and expiate for his oath, it is **obligatory** for him to divorce her, and he must be forced to do so. This is because Allah, Exalted be He, says:

> ***"For those who swear not to have sexual relations with their wives is a waiting time of four months, but if they return [to normal relations] – then indeed, Allah is Forgiving and Merciful. And if they decide on divorce – then indeed, Allah is Hearing and Knowing."*** (Qur'ān: Al-Baqarah: 226-227)

It is **prohibited** for the husband to divorce his wife while she is in her menses, during her period of confinement, during her state of major ritual purity (i.e. the period between the wife's menstruations) in which he has already had sexual intercourse with her. The husband is also prohibited to divorce his wife thrice at a time, as we will point out soon in detail, Allah willing.

The proofs of the legality of divorce are illustrated in the Qur'ân, the *Sunnah* (Prophetic Tradition) and the consensus of scholars. Allah Exalted be He, says:

> ***"Divorce is twice..."*** (Qur'ân: Al-Baqarah: 229)

Allah also says:

> ***"O Prophet, when you [Muslims] divorce women, divorce them for [the commencement of] their waiting period..."***
>
> (Qur'ân: At-Talâq: 1)

Moreover, the Prophet (PBUH) says:

> *"Divorce belongs only to the one who takes hold of the leg (i.e. the husband)."*[34]
>
> (Related by Ibn Mâjah and Ad-Dâraqutnî, and there are other *hadîths* indicating the same meaning)

Besides, many scholars report the consensus of *faqîhs* on the legality of divorce.

The wisdom behind divorce is clear, and it is one of the merits of this great religion, Islam. When necessary, divorce becomes the legal solution to marital problems. Allah, Exalted be He, says:

> ***"...then [after that], either keep [her] in an acceptable manner or release [her] with good treatment..."***
>
> (Qur'ân: Al-Baqarah: 229)

Allah also says:

> ***"But if they separate [by divorce], Allah will enrich each [of them] from His abundance. And ever is Allah Encompassing and Wise."*** (Qur'ân: An-Nisâ': 130)

Divorce is a relief and a good solution when there is no longer a benefit out of keeping the marriage tie, or when the wife is harmed by staying with her husband, or when either of the married couple is immoral, defiantly disobedient, and irreligious, unlike the other.

The communities prohibiting divorce always suffer many serious social problems such as the spread of suicide, crime, and the corruption of family life. The great religion of Islam permits divorce and makes proper rules to regulate it in order to achieve the desired interests and repel any possible evil,

and this is the typical way of Islam in all its great laws and regulations that maintain the interests of humans in the long and the short run. Therefore, we praise Allah, Exalted be He, for His bounty and bestowal of Islam upon us.

The statement of divorce is valid when pronounced by a legally qualified, free-willed, sane husband or by his authorized representative, as the Prophet (PBUH) says:

"Divorce belongs only to the one who takes hold of the leg (i.e. the husband)."

However, a Muslim becomes legally unqualified to divorce if his mental faculties are lacking due to something excusable, such as being insane, unconscious, asleep, a sufferer from a disease that causes unawareness such as pleurisy, being forced to drink an intoxicant, or taking anesthetic for medical treatment. If one in any of the aforementioned cases pronounces the spoken form of divorce, the divorce is not legally effective. To illustrate, Al-Bukhârî related in his *Sahîh* (Authentic Book of *Hadîth*) that `Alî Ibn Abû Tâlib (may Allah be pleased with him) said:

"Every divorce is permissible except that by an insane man."[5]

This is because sanity is the principle upon which a legal judgment is based. On the other hand, if a person's mental faculties are lacking due to his willingly taking an intoxicant, scholars differ about the validity of his divorce in such a case. In general, the Four Imâms as well as a group of Muslim scholars maintain that such a divorce is valid.

If a person is forced to divorce his wife, and he divorces her in order to avoid injustice, oppression, or persecution, his divorce is not legally effective. This is because the Prophet (PBUH) says:

"There is no divorce or emancipation in case of duress."[6]

(Related by Ahmad, Abû Dâwûd, and Ibn Mâjah)

Moreover, Allah, Exalted be He, says:

"Whoever disbelieves in [i.e. denies] Allah after his belief... except for one who is forced [to renounce his religion] while his heart is secure in faith..." (Qur'ân: An-Nahl: 106)

Though disbelief is more serious than divorce, Allah pardons those who pretend to be disbelievers under duress. Thus, divorce, with greater reason, is not legally effective when the husband is forced to do it. However, divorce can

be valid under duress. This is in case the husband has sworn not to have sexual intercourse with his wife and then four months pass and he still refuses to have sexual intercourse with her and expiate for his oath.

When a man is in a state of anger but still aware of what he is saying, his divorce is valid in this case. Yet, if he is too enraged to be aware of what he is saying, his divorce is deemed void. Moreover, if a man utters the statement of divorce jokingly, his divorce is deemed valid though he does not mean it, as he meant to utter the spoken form of divorce. And, Allah knows best.

Endnotes

1 Abû Dâwûd (2178) [2/438] and Ibn Mâjah (2018) [2/500].
2 See *Majmu'ul-Fatâwâ* (32/141).
3 This expression, namely "taking hold of a woman's leg", in Arabic, implies having sexual intercourse with her. Thus, the meaning of the *hadîth* is that the husband is the only one to whom the right of divorce belongs.
4 Ibn Mâjah (2081) [2/532] and Ad-Darâqutni (3946) [4/24].
5 Al-Bukhâri [9/481], At-Tirmidhî (1194) [3/496].
6 Abû Dâwûd (2193) [2/446] and Ibn Mâjah (2046) [2/514].

CHAPTER

3

Sunni[1] and Innovative Divorce

Sunni Divorce

The divorce according to the *Sunnah* (Prophetic Tradition) is the divorce that takes place according to the way ordained by Allah and His Messenger (PBUH). It is effected by the husband's single pronouncement of divorce in an interval between the wife's menstruations in which he has not had sexual intercourse with her, and then he leaves her until her waiting period is over. This divorce accords with the *Sunnah* in terms of number, as he pronounces a single divorce on his wife and leaves her until her waiting period is over. It also accords with the *Sunnah* in terms of timing, as he divorces her during her state of major ritual purity (i.e. the period between her menstruations) in which he has not had sexual intercourse with her. Allah, Exalted be He, says:

> ***"O Prophet, when you [Muslims] divorce women, divorce them for [the commencement of] their waiting period..."***
>
> (Qur'ān: Aṭ-Ṭalāq: 1)

Commenting on the aforementioned Qur'anic verse, Ibn Mas`ûd (may Allah be pleased with him) said:

> *"The verse means that women can be divorced only during their state of purity when no sexual intercourse has taken place."*[2]

Moreover, `Alî Ibn Abû Tâlib (may Allah be pleased with him) said:

> *"If people adhere to the ordinance of Allah concerning divorce, the man will never regret divorcing a woman. He pronounces a single divorce (at a time) on his wife, and then leaves her for three periods of menstruation during which he can take her back if he likes."*[3]

This means that as long as the woman is still in her waiting period, her husband can take her back, as Allah grants the man who has pronounced a single divorce on his wife a chance to take her back during her waiting period if he regrets divorcing her, provided it is not his third pronouncement of divorce on her. However, if it is the third divorce, the husband cannot take his ex-wife back.

Innovative Divorce

Innovative divorce refers to the divorce that takes place in a prohibited way such as the following cases:

- Divorcing one's wife by pronouncing the spoken form of divorce thrice simultaneously: (Innovative divorce in terms of number)
- Divorcing one's wife while she is in a state of menstruation or confinement: (Innovative divorce in terms of timing)
- Divorcing one's wife while she is in a state of purity in which he has had sexual intercourse with her: (Innovative divorce in terms of timing)

Innovative divorce concerning the number of the pronouncements of divorce makes one's ex-wife prohibited for one to take back until she marries another man and then separates from him. Allah, Exalted be He, says:

> ***"And if he has divorced her [for the third time], then she is not lawful to him afterward until [after] she marries a husband other than him..."*** (Qur'ân: Al-Baqarah: 230)

As for the innovative divorce concerning the timing of divorce, when such a divorce takes place, it is desirable for the husband to take his wife back. This is because when `Abdullâh Ibn `Umar (may Allah be pleased with them) divorced

his wife during her menses, the Messenger of Allah (PBUH) ordered him to take her back,[4] as related by the Group of Compilers of *Hadith*. Thus, if the husband in such a case takes his wife back, he must keep her until she becomes in a state of major ritual purity and then he can divorce her if he pleases.

It is prohibited for the husband to divorce his wife through the aforementioned innovated ways of divorce, whether concerning the number of the pronouncements of divorce or its timing. Allah, Exalted be He, says:

> ***"Divorce is twice. Then [after that], either keep [her] in an acceptable manner or release [her] with good treatment..."***
>
> (Qur'ân: Al-Baqarah: 229)

Allah also says:

> ***"O Prophet, when you [Muslims] divorce women, divorce them for [the commencement of] their waiting period..."***
>
> (Qur'ân: At-Talâq: 1)

I.e. while they are in a state of major ritual purity provided no sexual intercourse with them has taken place. In addition, when the Prophet (PBUH) was informed that a man had divorced his wife with three pronouncements of divorce at a time, he (PBUH) wondered angrily:

"Is the Book of Allah made light of while I am amongst you?!"[5]

Besides, 'Umar Ibnul-Khattâb (may Allah be pleased with him) used to beat any man who divorced his wife thrice (at a time) if he was brought to him[6]. For more illustration, when the Prophet (PBUH) was informed that 'Abdullâh Ibn 'Umar (may Allah be pleased with him) divorced his wife during her menses, he (PBUH) got angry and ordered him to take her back[7].

All the previous proofs indicate that it is obligatory for every Muslim man to adhere to the legal rulings on divorce observing both its number of pronouncements and timing. A Muslim has also to avoid the prohibited ways of divorce whether concerning the number of the pronouncements of divorce or its timing. However, many men, regrettably, do not understand or care about this nowadays, and, consequently, they cause themselves difficulty and regret, and then they seek solutions to get their wives back, discomfiting the *muftis* whom they refer to. In fact, all such problems are consequences of making light of the Book of Allah, Exalted be He.

Some men, unfortunately, use divorce as a weapon to threaten their wives with, forcing them to do something or preventing them from doing another. Other men heedlessly use divorce as an oath while dealing with or talking to others. Such men must fear Allah and keep away from uttering the oaths of divorce, for divorce is not made to be used as an oath, but to be resorted to when necessary and according to the specified number and timing of the pronouncement of divorce.

The Spoken Forms of Divorce

There are two spoken forms of divorce:

A- Direct pronouncement: It includes the word "divorce" or any of its derivatives that indicate that the husband divorces his wife, and it carries no other meaning than divorce, such as saying to one's wife, "I divorce you," or, "You are divorced," or, "You have become a divorcee." In such cases, the divorce is deemed valid and effective. Yet, if the husband says something like, "You are being divorced," or, "Get your divorce," and the like, divorce in such cases is invalid, as the spoken form does not indicate its effectiveness.

B- Indirect pronouncement: It includes metonymic words that imply divorce as well as other meanings, such as saying to one's wife something like, "You are free," or, "Go and keep away from me," or, "Go back to your parents," or, "There is no liability on your part towards me."

The legal difference between direct and indirect spoken forms of divorce is that divorce is valid once the husband utters any of the direct pronouncements, even if jokingly or unintentionally. This is because the Prophet (PBUH) says:

> *"There are three things which, whether undertaken seriously or in jest, are treated as serious: divorce, marriage and taking back a wife (after revocable divorce)."*
>
> (Related by the Five Compilers of *Hadith* except An-Nasâ'î)

However, divorce is invalid in case of uttering any of the indirect metonymic words of divorce, unless the husband does intend to divorce his wife. This is because such indirect metonymic words indicate some meanings other than divorce. Thus, if the husband does not mean to divorce his wife when uttering such words, divorce is invalid and ineffective, except in three cases:

1) If he utters these words when there is a controversy between him and his wife;

2) If he utters these words when he is angry;

3) If he utters these words in reply to his wife when she asks him to divorce her.

In the aforementioned three cases, divorce is deemed valid and effective as soon as the husband utters such metonymic words, even if he claims that he has not intended divorce, for the state he is in shows the intention of divorce. And, Allah knows best.

It is permissible for the husband to designate a representative to divorce his wife whether the representative is a stranger or even the wife herself, as it is permissible for the husband to authorize his wife to divorce herself if she wants. The authorized representative legally acts on behalf of the husband, and thus the rulings on direct or indirect pronouncements and the number and the timing of divorce are applied as if he is the husband himself, unless the husband restricts his representative to effect the divorce in a certain way.

Divorce is not valid unless it is pronounced by the husband (or his representative). In other words, if the husband has the intention of divorce without pronouncing it, divorce is still deemed invalid. The Prophet (PBUH) says:

> *"Allah has forgiven my followers the evil thoughts that occur to their minds, as long as such thoughts are not put into action or uttered."*[8]

However, there are two exceptional cases in which divorce is valid even if the husband (or his representative) does not pronounce the spoken form of divorce. The first case is when the husband writes down a direct pronouncement of divorcing his wife provided he does intend to divorce her. Yet, scholars differ if he does not have the intention of divorce by such writing, but the majority of them are of the opinion that divorce is also valid in this case. The second case is when a dumb husband makes an understandable gesture indicating divorce.

Concerning the number of the pronouncements of divorce, it depends on whether the husband is a freeman or a slave, but it has nothing to do with women; Allah, Exalted be He, addresses the Prophet and all Muslim men saying:

> ***"O Prophet, when you [Muslims] divorce women, divorce them for [the commencement of] their waiting period..."***
>
> (Qur'ân: At-Talâq: 1)

Allah also says:

> ***"And when you divorce women and they have [nearly] fulfilled their term..."*** (Qur'ân: Al-Baqarah: 231)

Moreover, the Prophet (PBUH) says:

> *"Divorce belongs only to the one who takes hold of the leg (i.e. the husband)."*[9]

A freeman is entitled to divorce his wife three times even if she is a slave, while a slave man is entitled to divorce his wife only twice even if she is a free woman. There is no dispute that if both the husband and wife are free (i.e. not slaves), the husband is entitled to divorce his wife three times, and if they are slaves, the husband is entitled to divorce his wife only twice. Yet, scholars differ when either the husband or the wife is free while the other is a slave. The preponderant view is that the number of the pronouncements of divorce is only dependent on the state of the husband, as previously explained, since divorce is essentially a right of the husband not the wife.

It is permissible for the husband to make exceptions while divorcing his wife or wives. Such exceptions can be related to the number of the pronouncements of divorce, such as saying, "You are divorced three times except one (i.e. twice)." Likewise, a man can exclude one of his wives while divorcing them, such as saying, "I divorce all my wives except Fâṯimah". However, the excluded thing must be half or less than half the general term. In other words, it is invalid to make the thing excepted more than the general term, such as saying to one's wife, "You are divorced three times except two (i.e. once)." Moreover, it is necessary to utter the exception when it concerns the number of divorce. For example, if the husband says to his wife, "You are divorced three times," while having the intention of excluding one time of divorce, it is deemed a threefold divorce. This is because the uttered number is considered a term that cannot be altered by a mere intention, since the spoken word is more reliable than the hidden intention. Nevertheless, it is permissible for the husband to exclude one of his wives by his mere intention while uttering the pronouncement of divorce. For example, if the husband says, "My wives are divorced," and he intends to make an exception of one of them, this exception is legally valid, though it is not verbally expressed. This is because the words "my wives" can refer to all or some of them, and thus the intention is a decisive criterion in this case.

It is permissible to make conditions for divorce. For example, the husband can say to his wife, "If you enter the house, you will be divorced," making the divorce dependent on her entrance to the said house.

The only one permitted to make conditions in divorce is the husband. Thus, if a man says, "If I marry so and so, I will divorce her," and then he marries

her, such a condition is deemed invalid, for the man was not her husband when he made it. This is due to the *hadîth* narrated on the authority of 'Amr Ibn Shu'ayb, from his father and his grandfather respectively, in which the Prophet (PBUH) says:

> *"The son of Âdam (Adam) should not make a vow about what he does not possess, or set free what he does not possess, or divorce what he does not possess."*[10]
>
> (Related by Ahmad, Abû Dâwûd, and At-Tirmidhî who deemed it a *hasan* (good) *hadîth*)

Allah, Exalted be He, says:

> ***"O you who have believed, when you marry believing women and then divorce them..."*** (Qur'ân: Al-Ahzâb: 49)

This verse and the aforementioned *hadîth* indicate that a man's divorce of an *ajnabiyyah* is invalid; there is consensus on this ruling when it is a direct pronouncement of divorce, and it is also agreed upon by the majority of scholars when it is a conditional pronouncement of divorce.

If the "husband" makes a condition for divorce, divorce is invalid unless the condition is fulfilled. Further, sometimes the husband is uncertain about his utterance of the spoken form of divorce, the number of the pronouncements of divorce he has made, or the fulfillment of the divorce conditions. If the husband is uncertain whether he has uttered the spoken form of divorce or not, divorce is deemed invalid, as marriage is a certain fact that cannot be nullified by a mere doubt. Likewise, divorce is invalid if the husband doubts the fulfillment of its conditions, as when he says to his wife, "If you enter such and such a house, you will be divorced," and then he doubts whether she has entered such a house or not, for marriage cannot be nullified due to mere uncertainty. On the other hand, if the husband is certain that he has divorced his wife but uncertain about the number of pronouncements of divorce he has made, it is only regarded as the one pronouncement of divorce which he is certain about. Other pronouncements of divorce are not taken into consideration as they are still doubtful, and the general legal principle is that certainty cannot be nullified by mere suspicion. This legal principle is a general, effective one, derived from some *hadîths* of the Prophet (PBUH); he (PBUH) says:

> *"Leave that which makes you doubt for that which does not make you doubt."*[11]

The Prophet (PBUH) also said concerning a man's uncertainty whether he had passed wind during prayer or not:

> *"He should not leave his prayer unless he hears sound or smells something."*[12]

There are some other *hadiths* conveying the same meaning. Such rulings indicate the leniency and perfection of *Shari'ah* (Islamic Law), so all praise is due to Allah, Lord of the worlds.

Endnotes

1 *Sunni*: According to the *Sunnah* (Prophetic Tradition).
2 Al-Bayhaqi (14915) [7/532].
3 Ibn Abû Shaybah (11736) [4/58]
4 Al-Bukhâri (5332) [9/597], Muslim (3638) [5/303], Abû Dâwûd (2179) [2/438], At-Tirmidhi (1177) [3/478], An-Nasâ'i (3399) [3/452], Ibn Mâjah (2019) [2/500].
5 An-Nasâ'i (3401) [3/453].
6 Ibn Abû Shaybah (17784) [4/92].
7 Muslim (3642) [5/306].
8 Al-Bukhâri (5269) [9/481] and Muslim (328) [1/328].
9 Ibn Mâjah (2081) [2/532] and Ad-Daraqutni (3946) [4/24].
10 At-Tirmidhi (1183) [3/486] and Ibn Mâjah (2047) [2/514].
11 At-Tirmidhi (2523) [4/668].
12 Al-Bukhâri (137) [1/312], and Muslim (802) [2/272].

CHAPTER

4

Taking Back One's Divorced Wife (*Raj`ah*)

Taking back one's revocably divorced wife during her waiting period without a new marriage contract is permissible according to the Qur'ān, the *Sunnah* (Prophetic Tradition), and the consensus of Muslim scholars.

Concerning the proof of its legality from the Noble Qur'ān, Allah, Exalted be He, says:

> ***"...And their husbands have more right to take them back in this [period] if they want reconciliation..."***
>
> (Qur'ān: Al-Baqarah: 228)

Allah also says:

> ***"Divorce is twice. Then [after that], either keep [her] in an acceptable manner or release [her] with good treatment..."***
>
> (Qur'ān: Al-Baqarah: 229)

Moreover, Allah, Exalted be He, says:

> ***"And when they have [nearly] fulfilled their term, either retain them according to acceptable terms or part with them according to acceptable terms..."*** (Qur'ân: At-Talâq: 2)

As for the *Sunnah*, the Prophet (PBUH) said about Ibn 'Umar when he divorced his wife:

> *"Order him to take her back."*[1]

Moreover, he (PBUH) divorced his wife Hafsah and then took her back[2]. Regarding the consensus of scholars on the legality of taking one's divorced wife back, **Ibnul-Mundhir** said:

> *"Scholars unanimously agree that taking back one's wife during her waiting period is permissible for the freeman who has made less than three pronouncements of divorce (on his wife), and for the slave man who has made less than two pronouncements of divorce."*[3]

The wisdom behind the legality of taking one's divorced wife back is that it is a chance for the husband if he regrets divorcing her and wants to maintain the marital life with her again, and this is a kind of divine mercy bestowed by Allah upon His servants.

There are some conditions for the validity of taking back one's divorced wife:

1) The number of pronouncements of divorce made by the husband must be less than three if he is a freeman and less than two if he is a slave. If the husband has already used up his lawful number of pronouncements of divorce, his ex-wife becomes unmarriageable to him until she marries and separates from another man.

2) The divorce must be after the consummation of marriage (i.e. having sexual intercourse). If the husband divorces his wife before having sexual intercourse with her, he cannot take her back, for she has no waiting period in this case. Allah, Exalted be He, says:

> ***"O you who have believed, when you marry believing women and then divorce them before you have touched them [i.e., consummated the marriage], then there is not for you any waiting period to count concerning them. So provide for them and give them a gracious release."*** (Qur'ân: Al-Ahzâb: 49)

3) The divorce must not be in return for a compensation given to the husband. If the wife pays compensation to her husband to get divorced, she becomes unlawful to him to take back unless with a new marriage contract and with her consent. This is because she ransoms herself by paying compensation to her husband to separate from him, and taking her back in this case contradicts her purpose in paying him such compensation.

4) Marriage must be originally valid. If the husband divorces his wife during an invalid marriage, he cannot take her back as she becomes irrevocable for him by divorce.

5) The husband must take his wife back during her waiting period, for Allah, Exalted be He, says:

   "...And their husbands have more right to take them back in this [period]..." (Qur'ān: Al-Baqarah: 228)

6) The husband's taking back of his wife must not be conditional. For example, it is invalid for a husband to say to his ex-wife, "If such and such happens, I will take you back."

   Scholars differ on whether it is a condition for the validity of returning one's ex-wife that each of the separated couple intends reconciliation. Some scholars maintain that it is a condition that must be fulfilled, for Allah, Exalted be He, says in this regard:

   "...if they want reconciliation..." (Qur'ān: Al-Baqarah: 228)

   Shaykhul-Islām Ibn Taymiyah (may Allah have mercy on him) said:

   "The husband is not permitted to take back his wife during her waiting period unless he intends reconciliation and wants to keep her in an acceptable manner."[4]

Some other scholars are of the opinion that the intention of reconciliation is not a condition for the validity of taking back one's ex-wife. They argue that the aforementioned noble verse, "***...if they want reconciliation...***", only calls them to reconcile and keep away from hurting one another, but it does not mean that reconciliation is a condition. Yet, the first opinion is the preponderant; and Allah knows best.

The legal spoken form pronounced by the husband to take back his revocable ex-wife can be through any proper words indicating that purpose, such as saying, "I take my wife back," or, "I return to my wife," or the like. Taking

back one's revocable ex-wife can also be valid by having sexual intercourse with her with the intention of taking her back according to the preponderant view in this regard.

If the husband takes his revocable ex-wife back, it is an act of the *Sunnah* to bring some people as witnesses; some scholars say that it is obligatory, as Allah, Exalted be He, says:

> ***"...And bring to witness two just men from among you..."***
> (Qur'ân: At-Talâq: 2)

And the latter is one of the opinions attributed to Imâm Ahmad. Moreover, **Sheikh Taqiyyuddîn** (may Allah have mercy on him) said, *"It is by all means invalid for the husband to take his revocable ex-wife back secretly."*[5]

The revocably divorced woman is legally considered a wife of her husband as long as she is still in her waiting period. Therefore, her husband must provide for her and afford her clothing and accommodation. On the other hand, the revocable ex-wife has the same duties of any wife; she has to stay at her husband's house and beautify herself so that he may take her back. If any of the separated couple dies during the waiting period, the other is entitled to inherit from him/her. In addition, it is permissible for the man to travel with his revocably divorced wife, to be alone with her, and to have sexual intercourse with her with the intention of taking her back.

The end of the waiting period is the deadline for taking one's revocable ex-wife back. Thus, if she becomes pure after her third menstruation period after the divorce, the waiting period is deemed over, and she becomes unlawful to him unless he remarries her with a new marriage contract, the consent of her guardian, and the presence of two just witnesses. Allah, Exalted be He, says:

> ***"...And their husbands have more right to take them back in this [period]..."*** (Qur'ân: Al-Baqarah: 228)

The meaning of this verse is that when the waiting period is over, the revocable ex-wife becomes unlawful to her ex-husband unless he remarries her with a new marriage contract, fulfilling its conditions. If the husband takes her back during her waiting period, meeting the legal conditions, the permissible number of pronouncements of divorce for him becomes one less than before.

When the husband uses up the permissible number of pronouncements of divorce, i.e. when he divorces his wife for the third time, she becomes unlawful for him to marry unless she lawfully marries and separates from another man. There are three conditions to make such an ex-wife lawful to her first husband:

1) She must marry another man

2) Her marriage to the other man must be legal

3) The second husband must have sexual intercourse with her

This is because Allah, Exalted be He, says:

> ***"And if he has divorced her [for the third time], then she is not lawful to him afterward until [after] she marries a husband other than him. And if he [i.e. the latter husband] divorces her, there is no blame upon them [i.e. the woman and her former husband] for returning to each other if they think that they can keep [within] the limits of Allah..."***
>
> (Qur'ân: Al-Baqarah: 230)

The great Muslim scholar **Ibnul-Qayyim** (may Allah have mercy on him) said:

> *"It is considered one of the greatest favors bestowed upon Muslims that the irrevocable ex-wife becomes lawful to her first husband after she marries and then separates from another man. The law of the Torah permits the divorced woman to remarry her husband if she does not marry another man whereas the law of the Gospel absolutely prohibits divorce. However, our Shari`ah (Islamic Law) is more perfect, comprehensive, and suitable for the interests of people; Islam permits the Muslim man to marry four women, and to have as many slave women as he likes. Moreover, the Muslim man can divorce his wife and then, if he longs for her, he is permitted to take her back. Yet, if he divorces her for the third time, it becomes prohibited for him to take her back unless she legally marries and separates from another man."*[6]

This means that the second man must be willing to take her as a wife, not to marry her and then separates from her to make her lawful to the first husband; if he does so, he is considered a borrowed billy goat, as referred to by the Prophet (PBUH). In addition, such a false marriage is invalid, and it does not make the woman lawful to the first husband. And, Allah knows best.

Endnotes

1 Al-Bukhâri (5251) [9/429] and Muslim (3637) [5/302].
2 Abû Dâwûd (2283) [2/493], An-Nasâ'i (3562) [3/523] and Ibn Mâjah (2016) [2/499].
3 See: "*Al-Ijmâ'*" (p. 126).
4 See the footnote in "*Ar-Rawd Al-Murbi'*" [6/602].
5 See: *Al-Ikhtiyarât* [p. 392].
6 See: "*I'lâm Al-Mwaqi'in*" (2/92).

CHAPTER

5

Îlâ' (Foreswearing One's Wife More Than Four Months)

Faqîhs define *îlâ'* as the potent husband's swearing, by Allah or one of His Attributes, not to have sexual intercourse with his wife forever or for a period of more than four months. This definition implies that the case is not regarded as *îlâ'* (which is prohibited in Islam) unless the following conditions are there:

1) The husband is potent.
2) The husband swears by Allah or one of His Attributes, not by divorce, emancipation, or vow.
3) The husband swears that he will not have a legal sexual intercourse with his wife (i.e. in the vagina).
4) The husband swears not to have a legal sexual intercourse with his wife for more than four months.
5) The wife is fit for having sexual intercourse.

If all the aforementioned conditions are there, the husband is legally regarded as committing *îlâ'*, and thus the rulings on *îlâ'* apply to him. However, if one of these conditions is missing, the case is not considered *îlâ'*. *Îlâ'* is mentioned in the Noble Qur'ân, as Allah, Exalted be He, says:

> ***"For those who swear not to have sexual relations with their wives is a waiting time of four months, but if they return [to normal relations] – then indeed, Allah is Forgiving and Merciful. And if they decide on divorce – then indeed, Allah is Hearing and Knowing."*** (Qur'ân: Al-Baqarah: 226-227)

The meaning of these two verses is that if the husband, who swears not to have sexual intercourse with his wife for more than four months, insists on not having sexual intercourse with her after the four months, he is to be ordered to come back to normal sexual relation with her and expiate for his oaths. Otherwise, he must be legally ordered to divorce her if she demands divorce. This Islamic wise and just ruling removes the harm and injustice caused to women and nullifies what some men used to do in the Pre-Islamic Period of Ignorance (the *Jâhiliyyah*), when they used to prolong the period of *îlâ'*.

Îlâ' for more than four months is prohibited in Islam, as it is an oath of abandoning a marital obligation. As indicated in the general meaning of the aforementioned verses, the husband is not considered to have forsworn his wife unless he can validly divorce her, whether he is a Muslim, a disbeliever, a freeman, a slave, an adult, or a percipient child (who will be legally ordered, when he reaches puberty, either to have normal (sexual) relation with his wife or to divorce her). The ruling on *îlâ'* is also applied even if the husband made it when angry, or while suffering from a curable disease. Moreover, its ruling is also applied even if the marriage is not yet consummated (i.e. the married couple have not had sexual intercourse yet).

However, the husband is not considered to have forsworn having sexual intercourse his wife if he is insane or unconscious, in which cases man is unaware of what he is saying and the intention is lacking. In addition, the case is not regarded as *îlâ'* if the husband is impotent, such as a castrated or a paralytic, for his oath is not the only reason for his abandonment of having sexual intercourse with his wife.

The case is also deemed *îlâ'* if the husband swears by Allah that he will not have sexual intercourse with his wife forever, or for a period more than four months, or when he stipulates something unexpected to happen before four months, such as the Advent of Jesus Christ, the son of Mary (PBUH),

or the coming out of the Antichrist. Likewise, the case is considered *ilâ'* if the husband makes a condition that his wife must commit a prohibited deed or leave an obligation. For example, he may say to her, "I swear by Allah that I will not have sexual intercourse with you until you abandon performing prayer (or drink wine, etc.)." This is because he stipulates what is legally forbidden, which is similar to the case of stipulating something impossible to happen.

In all the previous cases, the period of *ilâ'* must not exceed four months, as Allah, Exalted be He, says:

> ***"For those who swear not to have sexual relations with their wives is a waiting time of four months..."***
>
> (Qur'ân: Al-Baqarah: 226)

It is related in *Sahîh Al-Bukhârî (Al-Bukhârî's Authentic Book of Hadîth)* that Ibn `Umar (may Allah be pleased with him) said:

> *"When the four months are over, the husband must be legally ordered either to give up ilâ' (i.e. to have normal sexual relation with his wife) or to divorce her. Still, divorce is not effected unless the husband makes its pronouncement."*[1]

The same ruling was related by Al-Bukhârî on the authority of more than ten Companions[2].

Sulaymân Ibn Yasâr said:

> *"I was a contemporary of more than ten of the Companions of the Messenger of Allah (PBUH) and all of them were of the opinion that when the four months are over, the husband must be legally ordered either to give up ilâ' or to divorce her."*[3]

This is also the opinion of the majority of Muslim scholars and the apparent meaning of the aforementioned Qur'anic verses.

The days of menstruation are not legally included in the four months of *ilâ'*. If the husband has sexual intercourse with his wife after this period is over, he is considered to have returned to normal marital life with his wife, as having sexual intercourse is a sign of returning to normal martial life. **Ibnul-Mundhir** said, *"As far as I am concerned, all scholars unanimously agree that the returning to one's wife (after ilâ') means having sexual intercourse with her."*[4] Thus, the woman regains her marital right from her husband.

If the four months are over and the husband still refuses to have sexual intercourse with his wife, he must be forced by the judge to divorce her, provided it is the wife's wish. This is because Allah, Exalted be He, says:

> ***"And if they decide on divorce – then indeed, Allah is Hearing and Knowing."*** (Qur'ân: Al-Baqarah: 227)

However, if such a husband still refuses either to have normal sexual relation with his wife or to divorce her, the judge divorces her or cancels the marriage contract, as the judge is legally considered the husband's guardian in this case, so he is entitled to divorce her on behalf of the husband.

Faqîhs apply the same rulings to those men who inexcusably and harmfully abandon having sexual intercourse with their wives for more than four months, even if without forswearing. The same applies in case of *zihâr* for a period that exceeds four months after which the husband still refuses to expiate for it. These two cases have the same ruling on *îlâ'*, as husbands in both cases abstain from having sex with their wives, causing them harm. And Allah, Exalted be He, knows best.

It may happen that the four months of *îlâ'* are over while any of the spouses has a certain excuse that makes him/her unable to have sexual intercourse as a sign of returning to normal marital life. In such a case, scholars maintain that the husband must be legally ordered to return to his wife by saying something indicating returning to normal sexual relation with one another, such as saying, "I will have sexual intercourse with you once I can." This is because the main purpose of returning to one's wife is giving up the intention of harming her (through *îlâ'*). Such a statement made by the husband indicates his intention not to harm his wife (by *îlâ'*) any more. Afterwards, when he becomes able to have sexual intercourse, he has either to have sexual intercourse with his wife or to divorce her, as the excuse for not having sexual intercourse is no longer there; and Allah knows best.

Endnotes

1 Al-Bukhârî (5291) [9/526].
2 Al-Bukhârî (9/526).
3 Ad-Darâqutnî (3996) [4/33] and Al-Bayhaqî (15207) [7/618].
4 See the footnote in "*Ar-Rawd Al-Murbi'*" [6/624].

CHAPTER

6

Zihâr

Zihâr is the saying by a husband to his wife, when he wants to abstain from having sex with her, "(Sexually,) you are to me like the back of my mother." Sometimes the husband likens his wife to his sister or any woman prohibited for him due to blood relations, breastfeeding, or relations by marriage, instead of saying "my mother", while pronouncing *zihâr*.

Zihâr is prohibited according to the Qur'ân, as Allah, Exalted be He, says:

> ***"Those who pronounce the zihâr among you [to separate] from their wives – they are not [consequently] their mothers. Their mothers are none but those who gave birth to them. And indeed, they are saying an objectionable statement and a falsehood..."***
>
> (Qur'ân: Al-Mujâdilah: 2)

The meaning is that those men, who pronounce *zihâr*, say grievous and false words that the *Shari'ah* (Islamic Law) disapproves of. Such words are

mere lies and objectionable statements that are definitely prohibited, for such a man prohibits for himself what Allah has not prohibited for him, making his wife sexually prohibited for himself as if she is his mother, though she is not.

Zihâr was considered a kind of divorce during the Pre-Islamic Period of Ignorance (the *Jâhiliyyah*), but afterwards Islam repudiated it and considered it an oath requiring expiation. Thus, the man who pronounces *zihâr* and his wife are prohibited to enjoy one another by having sexual intercourse or even foreplay until the husband expiates his pronouncement of *zihâr*. This is because Allah, Exalted be He, says:

> ***"And those who pronounce zihâr from their wives and then [wish to] go back on what they said - then [there must be] the freeing of a slave before they touch one another..."***
>
> (Qur'ân: Al-Mujâdilah: 3)

Moreover, the Prophet (PBUH) said to a man who pronounced *zihâr* from his wife:

> *"Then do not approach her (i.e. do not have intercourse with her) until you do what Allah ordered you to do (i.e. until you expiate for it)."*[1]
>
> (Related by At-Tirmidhî who deemed it a *sahîh hadîth)*

So, the man who pronounces *zihâr* from his wife must expiate his *zihâr* first if he wants to have sexual intercourse with her, for Allah, Exalted be He, says:

> ***"...then [there must be] the freeing of a slave before they touch one another. That is what you are admonished thereby; and Allah is Acquainted with what you do. And he who does not find [a slave] - then a fast for two months consecutively before they touch one another..."*** (Qur'ân: Al-Mujâdilah: 3-4)

These two noble verses indicate that it is obligatory for the husband who has pronounced *zihâr* to expiate for it before having sexual intercourse with his wife, and that his wife is prohibited for him until he expiates his pronouncement of *zihâr*. This is the opinion of the majority of the scholars in this regard.

To expiate his pronouncement of *zihâr*, the husband must follow the sequence of expiations mentioned in the aforementioned verses. He must free a slave if possible; otherwise, he must observe fasting for two months consecutively, and if he cannot due to an illness or the like, the last alternative for him is to feed sixty poor persons. Allah, Exalted be He, says:

"And those who pronounce ẕihâr from their wives and then [wish to] go back on what they said – then [there must be] the freeing of a slave before they touch one another. That is what you are admonished thereby; and Allah is Acquainted with what you do. And he who does not find [a slave] – then a fast for two months consecutively before they touch one another; and he who is unable – then the feeding of sixty poor persons..."

(Qur'ân: Al-Mujâdilah: 3-4)

In the aforementioned verses, Allah states that ***"those who pronounce ẕihâr from their wives"*** and then regret it and wish to return to normal sexual relations with them have to expiate for their pronouncement of *ẕihâr* ***"before they touch one another"*** Such expiation can be one of three things:

1- Emancipation of a Slave

The expiation of *ẕihâr* can be through ***"freeing of a slave"*** if the husband has any, or able to afford to buy one with his surplus money (that is not needed to meet his essential needs and the needs of those whom he supports).

The slave to be freed must be a believer, as Allah stipulates a believing slave for the expiation prescribed for manslaughter; Allah, Exalted be He, says:

"...And whoever kills a believer by mistake – then the freeing of a believing slave..." (Qur'ân: An-Nisâ': 92)

Thus, according to analogical deduction, the slave to be freed in expiation for *ẕihâr* must be a believer as well, for the unrestricted ruling prevails over the restricted similar one. Also, the slave to be freed in expiation for *ẕihâr* must be free of any defect that badly affects his/her ability to work, for the emancipation is intended to free the slave and enable him/her to earn his/her living. This cannot be achieved if the slave is afflicted with a defect that badly affects his/her ability to work, such as blindness, paralysis, and the like.

2- Fasting for Two Successive Months

There are three conditions for the validity of expiating *ẕihâr* through fasting:

1) The husband must be unable to free a slave.

2) The husband must observe fasting for two consecutive months, during which he is prohibited to interrupt his fasting except for an obligatory fasting, like fasting the month of Ramaḏân. It is also prohibited to

interrupt those two months of fasting except for an obligatory breaking of fasting, like that on the days of the Two *'Îds* (Feasts) and on the Days of *Tashriq* (11th, 12th and 13th of Dhul-Hijjah; the three days following the Day of Sacrifice). Fasting those two months can also be interrupted if there is a legal excuse, such as an exhausting journey or an illness. Breaking the fast due to either of the above reasons is not an interruption of the consecutive two-month fasting in expiation for *zihâr*.

3) The husband must have the intention of performing expiatory fasting for *zihâr* at the night preceding his fasting day.

3- Feeding Sixty Poor Persons

There are three conditions for the validity of expiating *zihâr* through feeding sixty poor persons:

1) The husband must be unable to observe the expiatory fasting.

2) The poor person to be fed must be a free Muslim entitled to receive *Zakâh*.

3) The amount to be given to the poor person must not be less than one *mudd* (a standard measure that equals 543 grams) of wheat or half a *sâ'* (a standard measure that equals 2172 grams) of any other cereals.

In general, intention is a main condition for the validity of any expiation, for the Prophet (PBUH) said:

> *"Verily, (the correctness and rewards of) deeds depend upon intentions, and every person gets but what he has intended."*

Besides the Qur'anic proof, there is another proof stated in the *Sunnah* (Prophetic Tradition) illustrating the legal ways of expiating for *zihâr* and their priority order. It is a *hadîth* narrated by Khawlah Bint Mâlik Ibn Tha'labah (may Allah be pleased with her) who said:

> *"My husband, Aws Ibnus-Sâmit, pronounced zihâr from me, so I went to the Messenger of Allah (PBUH) to complain to him. The Messenger of Allah (PBUH) disagreed with me about him (i.e. her husband) and said, 'Fear Allah, for he (i.e. her husband) is your cousin.' He (PBUH) kept disagreeing with me until the following Qur'anic verse was revealed: '**Certainly has Allah heard the speech of the one who argues (i.e., pleads) with you, (O Muhammad),***

concerning her husband...' (Qur'ân: 58: 1) *The Prophet (PBUH) then said, 'He should emancipate a slave then.' I said, 'He cannot afford it.' He said, 'Then he should fast for two consecutive months.' I said, 'O Messenger of Allah! He is an old man; he cannot observe fasting.' He (PBUH) said, 'Then he should feed sixty poor people.' I said, 'He has nothing which he may give in charity.' He (PBUH) said, 'I shall help him with a basket of dates.' I said, 'I shall help him with another basket of dates.' The Prophet (PBUH) said, 'That is good of you. Go and feed sixty poor people on his behalf, and return to your cousin.' "*[2]

(Related by Abû Dâwûd)

As we see, our great religion, Islam, offers solutions for all kinds of problems including marital ones. As shown above, Islam has solved the problem of the *ẕihâr* that used to be a dilemma during the Pre-Islamic Period of Ignorance (the *Jâhiliyyah*), when people had to separate the married couple as a solution, causing their family breakup. What a great religion Islam is!

In addition, our religion, when ordaining the expiation for *ẕihâr*, gently considers the conditions of the husband, and thus the husband can free a slave, observe fasting, or feed poor people, according to his ability; all praise be to Allah for that.

Endnotes

1 Abû Dâwûd (2221) [2/462], At-Tirmidhi (1202) [3/503], An-Nasâ'i (3457) [3/479], and Ibn Mâjah (2065) [2/524].

2 Abû Dâwûd (2/460).

CHAPTER

7

Li`ân (Allegation of Adultery Sworn against One's Wife)

Allah, Exalted be He, prohibits Muslims to falsely accuse the innocent people of adultery, and He threatens those committing such a sin with severe punishment. Allah, Exalted be He, says:

> ***"Indeed, those who [falsely] accuse chaste, unaware and believing women are cursed in this world and the Hereafter; and they will have a great punishment. On a Day when their tongues, their hands and their feet will bear witness against them as to what they used to do. That Day, Allah will pay them in full their true [i.e., deserved] recompense, and they will know that it is Allah Who is the Manifest Truth [i.e., Perfect in justice]."***
>
> (Qur'ân: An-Nûr: 23-25)

Moreover, Allah has ordained that whoever accuses a Muslim of adultery or fornication without producing four witnesses must be punished with eighty lashes and considered a defiantly disobedient person unless he repents after that and corrects himself. Allah, Exalted be He, says:

> ***"And those who accuse chaste women and then do not produce four witnesses – lash them eighty lashes and do not accept from them testimony ever after. And those are the defiantly disobedient. Except for those who repent after that and correct themselves. For, indeed, Allah is Forgiving and Merciful."***
>
> (Qur'ân: An-Nûr: 4-5)

The aforementioned verses show the stern punishment and ruling applied when a Muslim accuses a woman other than his wife of adultery. However, when a Muslim man accuses his own wife with adultery, there is another ruling to be applied called the *li`ân*. *Li`ân* is four testimonies ensured by sworn oaths taken by each spouse, and accompanied by the curse or wrath of Allah upon the liar, as will soon be explained. If a man charges his wife with adultery and cannot produce clear evidence (through witnesses), *li`ân* can spare him the legal punishment for the false accusation of adultery. Allah, Exalted be He, says:

> ***"And those who accuse their wives [of adultery] and have no witnesses except themselves – then the witness of one of them [shall be] four testimonies [swearing] by Allah that indeed, he is of the truthful. And the fifth [oath will be] that the curse of Allah be upon him if he should be among the liars. But it will prevent punishment from her if she gives four testimonies [swearing] by Allah that indeed, he is of the liars. And the fifth [oath will be] that the wrath of Allah be upon her if he was of the truthful."***
>
> (Qur'ân: An-Nûr: 6-9)

Thus, the husband says four times, "I testify by Allah that my wife has committed adultery." He must point at his wife if she is present, or mention her name if she is absent. In the fifth testimony, he says the same but he adds, "...and may the curse of Allah be upon me if I am lying." In reply and defense, the wife says four times, "I testify by Allah that he is lying about the adultery he has charged me with." In the fifth testimony, she says the same but she adds, "...and may the wrath of Allah be upon me if he is telling the truth." This is because the one who knows the truth and denies it incurs the "wrath" of Allah.

There are some conditions for the validity of *li`ân*:

- The two spouses are legally accountable.
- The husband charges his wife with adultery.
- The wife keeps on refuting him and charging him with lying until the end of *li`ân*.
- The *li`ân* is conducted by a judge.

If the case of *li`ân* meets all the aforementioned conditions and is made in the aforementioned way, it results in the following legal rulings:

1) The husband becomes no longer liable to be punished for false accusation of adultery.
2) The couple must be separated, and the wife becomes prohibited for the husband to remarry forever.
3) Her child will no longer bear the name of the husband if the latter denies the child during *li`ân* by saying, "This child is not mine."

The husband resorts to *li`ân* if he sees his wife committing adultery but he cannot produce evidence, or if he has strong presumptions that his wife commits adultery, as when he sees a wicked man notorious for dissolution secretly visiting her. Therefore, there is a legal wisdom behind the prescription of *li`ân*; namely that it spares the husband the disgrace and shame of his wife's adultery, the painful marital life with her, and the paternity of a child who is not his. The husband cannot often produce the evidence of his wife's adultery, and his wife does not often confess her crime. Accordingly, since the husband's accusation cannot be accepted without evidence, the only legal solution is public imprecation through strong oaths taken by the spouses. Thus, the prescription of the *li`ân* solves the problem of such a husband and relieves him from any discomfort.

Since the husband has no witness against his wife but himself, the wife is legally entitled to oppose his testimonies by equivalent repeated testimonies to avert the punishment. If the husband refrains from swearing the allegation of adultery against his wife in the way mentioned above, he is to suffer the legal punishment for false accusation. Likewise, if she refuses to swear by Allah that he is telling lies in the way previously pointed out, his testimonies are considered irrefutable evidence of her sin. In this regard, **Ibnul-Qayyim** said:

> *"This ruling on li`ân accords with the legal proofs. According to the Mâliki, Shâfi`i, and Hanbali Schools, as well as others, the wife*

must suffer the legal punishment for adultery if she refuses to swear (her husband is lying about her committing adultery); this is the sound opinion, as it is the opinion indicated in the Noble Qur'ân. It is also the opinion maintained by Shaykhul-Islâm Ibn Taymiyah and others."[1]

According to the *Sunnah* (Prophetic Tradition), the proof of the legality of resorting to *li`ân* when necessary is the *hadith* related by Al-Bukhârî and Muslim on the authority of Ibn `Umar:

"When Ibn `Umar (may Allah be pleased with him) was asked if there should be separation between the two spouses in case of li`ân, he said, 'Glorified be Allah, yes. The first one who asked (the Prophet) about it was so and so. He said, 'O Messenger of Allah! If one of us finds his wife committing adultery, what should he do? If he talks, that is something great, and if he keeps silent, that is also something great.' The Prophet (PBUH) kept quiet and did not answer him. After some time, he (that very person) came to him (the Prophet) and said, 'I have been involved in that very case about which I had asked you.' Allah, Almighty and Ever-Majestic be He, then revealed the verses (regarding the ruling on li`ân) of the Sura of An-Nûr (the Light), ***'And those who accuse their wives (of adultery)...'*** (Qur'ân: An-Nûr: 6) *Thereupon, he (the Prophet) recited them to him, admonished him, exhorted him, and informed him that the torment of the world is less painful than that of the Hereafter. He (the man) said, 'No, by Him Who sent you with Truth as Prophet, I have not told a lie against her.' He (the Prophet) then called her (the man's wife), admonished her, exhorted her, and informed her that the torment of this world is less painful than that of the Hereafter. She said, 'No, by Him Who sent you with Truth as Prophet, he is a liar.' The Prophet started with the man and made him swear and the man swore four testimonies (swearing) by Allah that indeed he was speaking the truth, and his fifth (oath) was that the curse of Allah be upon him if he was telling a lie. Then the woman was summoned and she gave four testimonies (swearing) by Allah that indeed he (her husband)*

was a liar, and her fifth (oath) was that the wrath of Allah be upon her if he was speaking the truth. He (the Prophet) then effected separation between the two.' "[2]

Endnotes

1 See: "*Zâdul-Ma'âd*" (4/95) and *Al-Ikhtiyarât* [p. 345].
2 Al-Bukhârî (no. 5311, 5312) and Muslim (no. 1493).

CHAPTER

8

Establishing Paternity

If a man's wife or bondmaid gives birth to a child, the man is considered to be his father when there is a possibility that the child could be his, as when the woman is living with him as his wife. This is because the Prophet (PBUH) said:

> *"The child belongs to the owner of the bed (i.e. the husband or the master)."*[1]

There are three cases in which there is a possibility that the child belongs to a certain man:

The first case is when the woman is his wife and gives birth to her child after half a year of their first sexual intercourse, whether the man lives with her or not, since the newborn baby can be this man's child and there is nothing to prove otherwise.

The second case is when the woman is divorced and gives birth to her child after less than four years after her irrevocable divorce, for the

maximum period of pregnancy is four years. In this case, there is a possibility that the child is from her ex-husband, and thus the child is attributed to him.

In the two aforesaid cases, the husband must be ten years old or more (to be able to have children), for the Prophet (PBUH) said:

"Command your children to pray when they become seven (years old) and beat them for (neglecting) it (i.e. prayer) when they become ten (years old); and arrange their beds (to sleep) separately."

The Prophet's command to make the children sleep separately when they become ten years old is a proof that they can have sexual intercourse, which leads to pregnancy and giving birth. This implies that a ten-year-old child can be a father even though his puberty is not evident, as puberty is evident only when its signs are apparent on him. Thus, Muslim scholars are of the opinion that the husband's ability to have sexual intercourse is enough to make the newborn baby belong to him, and thus people's lineages being preserved.

The third case (in which the newborn baby can belong to the husband) is when the revocably divorced wife gives birth to her child in a four-year period starting after divorce and before the expiry of her waiting period. The same applies when the revocably divorced wife gives birth to a child before a four-year period after the expiry of her waiting period. This is because the ruling on a revocably divorced woman in her waiting period is the same as that of a wife, so the ruling on paternity in case of revocable divorce is similar to that in case of being married.

If a master admits that he has had sexual intercourse with his bondmaid, or if there is a proof of their sexual intercourse, then the child she gives birth to six months or more after the intercourse belongs to this man. This is because she is legally considered his lawful woman by such intercourse, according to the generality of the *hadith* in which the Prophet (PBUH) said:

"The child belongs to the owner of the bed (i.e. the husband or the master of a slave girl)."

If a master admits that he has had sexual intercourse with his bondmaid, and then he has sold her or set her free, he is considered the father of the child she gives birth to in less than six months after her sale or emancipation. This is because the minimum period of pregnancy is six months, and if this bondmaid

gives birth to her child in less than six months after their separation, and her child lives, it becomes clear that she had conceived her child when she had been her master's lawful woman before her sale or emancipation; the Prophet (PBUH) said:

> *"The child belongs to the owner of the bed (i.e. the husband or the master)."*

There are two cases in which the child cannot belong to the husband:

The first case is when the woman gives birth to an alive child in a period less than six months after her marriage, for this period is not enough for conceiving and giving birth to a child. In this case, the wife must have been pregnant before her marriage to her present husband.

The second case is when the husband irrevocably divorces his wife and then she gives birth to a child in "**more**" than four years after divorce. This is because it is evident that she has conceived the child after her divorce.

The child of a bondmaid will not belong to her master if he claims that he made sure she had her menstrual period after having sexual intercourse with him, as this makes him certain she did not conceive a child after having sexual intercourse with him. Therefore, her child surely belongs to another man. The master's claim is accepted in this case, as it is so difficult to verify whether she really had her menstrual period and did not conceive a child after having sexual intercourse with him or not. However, such a claim to disown the child is not legally accepted unless the master takes an oath and swears by Allah that this child does not belong to him, as he thus denies any duty related to his paternity of the child.

If there is a dispute over the lineage of a newborn baby, the lawful bed relations are legally more considered than a mere resemblance between the newborn baby and its claimer. For example, when a master claims the child of his bondmaid to be his and another man who had sexual intercourse with her claims the child because the child resembles him, the child legally belongs to the master, for the Prophet (PBUH) said:

> *"The child belongs to the owner of the bed (i.e. the husband or the master of a slave girl)."*

The child follows the pedigree of his father, for Allah, Exalted be He, says:

> ***"Call them by [the names of] their fathers..."***
>
> (Qur'ân: Al-Ahzâb: 5)

However, when it comes to the child's religion, the child follows the better religion of his parents. For example, if a Christian man marries a polytheist woman or vice versa, the child follows Christianity. Yet, the child follows his mother concerning freedom or slavery, except when there is a previous condition or a kind of deception.

After this quick illustration of the Islamic rulings on the establishment of paternity and verification of lineage, we realize the keen interest of Islam to protect and verify people's pedigrees as there are consequent interests, such as maintaining the ties of kinship, inheritance, guardianship, and the like. Allah, Exalted be He, says:

> ***"O mankind, indeed We have created you from male and female and made you peoples and tribes that you may know one another. Indeed, the most noble of you in the sight of Allah is the most righteous of you. Indeed, Allah is Knowing and Acquainted."***
>
> (Qur'ân: Al-Hujurât: 13)

Moreover, the verification of the lineage is not intended for boastfulness and chauvinism known during the Pre-Islamic Period of Ignorance (the *Jâhiliyyah*). Rather, it aims at cooperation, maintaining the blood ties, and being merciful towards one another. May Allah guide us all to what He likes and pleases.

Endnotes

1 Al-Bukhârî (2218) [4/519] and Muslim (3600) [5/279].

CHAPTER

9

Waiting Period

The waiting period is a result of divorce, and it refers to a legally specified period of waiting after divorce. The proofs of the waiting period are derived from the Noble Qur'ân, the *Sunnah* (Prophetic Tradition) and the consensus of Muslim scholars.

Concerning the proofs in the Noble Qur'ân, Allah, Exalted be He, says:

> ***"Divorced women remain in waiting [i.e., do not remarry] for three periods..."*** (Qur'ân: Al-Baqarah: 228)

He also says:

> ***"And those who no longer expect menstruation among your women - if you doubt, then their period is three months, and [also for] those who have not menstruated. And for those who are pregnant, their term is until they give birth..."***
>
> (Qur'ân: At-Talâq: 4)

This concerns the cases of separation between wife and husband in life. However, concerning the case of the death of the husband, Allah, Exalted be He, says:

> ***"And those who are taken in death among you and leave wives behind – they, [the wives, shall] wait four months and ten [days]"***
> (Qur'ân: Al-Baqarah: 234)

The proof derived from the *Sunnah* is the *hadîth* narrated on the authority of `Â'ishah (may Allah be pleased with her) who said:

> *"Barîrah was ordered (by the Prophet) to count three monthly periods as a waiting period."*[1]
>
> (Related by Ibn Mâjah)

There are other *hadîths* indicating the same legal ruling.

As for the wisdom behind the prescription of the waiting period, it is to make sure the woman has not conceived a child before separating from her husband, in order not to let any confusion take place concerning the lineage of the child. Moreover, this waiting period gives the husband the chance to repent divorcing her and to take his wife back as long as his divorce is revocable. Honoring the marriage contract and pointing out its sanctity are also intended through the prescription of the waiting period, and so is esteeming the right of the ex-husband. Besides, the right of the fetus is highly observed through the prescription of the waiting period when the divorced wife is pregnant. In general, the waiting period is considered protective of the previous marriage.

The waiting period is obligatory upon every woman who has separated from her husband whether by divorce, by the *khul`* (wife's release against payment), by a dissolution of the marriage contract, or by the death of her husband. It is a condition to make the waiting period valid that such a husband consciously had privacy with the wife with her consent and he was potent, whether she was a freewoman or a slave girl, an adult or a minor of those fit to have sexual intercourse.

As for the woman from whom her husband separates before consummating marriage with her, whether through divorce or the like, while he is alive, she has no waiting period. Allah, Exalted be He, says:

> ***"O you who have believed, when you marry believing women and then divorce them before you have touched them [i.e., consummated the marriage], then there is not for you any waiting period to count concerning them..."*** (Qur'ân: Al-Ahzâb: 49)

The verb ***"to count"*** in the verse refers to counting the periods or months to determine the time of the waiting period, and ***"have touched them"*** implies having sexual intercourse with them. The noble verse indicates that there is no waiting period for the woman divorced before consummating marriage, and there is no dispute among scholars over this ruling. The mentioning of the ***"believing women"*** in the verse is a mere reference to the majority of the wives of Muslims, since Muslim scholars unanimously agree that there is no difference between the believing women and those of the People of the Scripture (Christian or Jewish women) concerning this ruling.

However, when the husband dies, his wife must count her prescribed waiting period whether he has had consummated the marriage or not, for Allah, Exalted be He, says:

> ***"And those who are taken in death among you and leave wives behind – they, [the wives, shall] wait four months and ten [days]..."*** (Qur'ân: Al-Baqarah: 234)

Moreover, there is no legal text or proof to differentiate between the consummated and unconsummated marriages in this respect.

There are six kinds of women in their waiting period:

1) The pregnant widow or the pregnant divorced woman
2) The non-pregnant widow
3) The divorced woman who still has her monthly menstrual period
4) The divorced woman who does not have a monthly menstrual period, due to young age or menopause
5) The divorced woman who no longer has her monthly menstrual period, without an apparent reason
6) The wife of a missing man

Concerning the pregnant widow or the pregnant divorced woman, her waiting period lasts until she gives birth, for Allah, Exalted be He, says:

> ***"...And for those who are pregnant, their term is until they give birth..."*** (Qur'ân: At-Talâq: 4)

The noble verse indicates that the waiting period of the pregnant woman ends when she gives birth. Some of the *Salaf* (early Muslim scholars) maintained that the pregnant widow must consider the longer period: either until she gives birth or until four months and ten days pass[2]. However, afterwards, Muslim

scholars unanimously agreed that the waiting period for the pregnant woman ends when she gives birth, whether she is a divorcee d or a widow.

However, the waiting period prescribed for the pregnant woman does not end if she miscarries, and her embryo is a mere unformed lump of flesh. The waiting period of the pregnant woman ends when she gives birth to a newborn that belongs to the separated (by divorce, death, etc.) husband; thus, her waiting period does not end if she gives birth to a child that does not belong to the separated husband. For example, if the husband cannot have children due to a congenital defect or young age, or when the child is born alive in a period of pregnancy less than six months after consummating their marriage, this child does not belong to this separated husband. Therefore, her waiting period does not end by giving birth in such cases.

The minimum period of pregnancy is six months, as Allah, Exalted be He, says:

> ***"...and his gestation and weaning [period] is thirty months..."***
> (Qur'ân: Al-Ahqâf: 15)

And

> ***"Mothers may nurse [i.e., breastfeed] their children two complete years..."*** (Qur'ân: Al-Baqarah: 233)

If we subtract the period of breastfeeding, twenty-four months, from thirty months, the remaining is six months which is the minimum period of pregnancy, and there is no child that can live if born in less than six months after conception.

Muslim scholars differ on determining the maximum period of pregnancy. The most preponderant view is that this period depends on the actual cases that have already occurred. **Al-Muwaffaq Ibn Qudâmah** said, *"When there is no legal text, we must resort to the actual cases, and some cases of pregnancy have been reported to last for five years and more."*[3] However, the common period of pregnancy is nine months, for most women give birth after nine months of the conception.

It is impermissible to harm or assault the embryo as it is highly protected in the Islamic *Shari'ah* (Islamic Law). If the embryo, after the soul has been breathed in it, is miscarried and dies, due to an assault against it, blood money and expiation are obligatory upon the criminal. If the pregnant woman deserves the legal punishment of lashing or that of stoning to death, it must be postponed until she gives birth. Also, it is impermissible for the pregnant woman to cause herself to miscarry by taking medicine or the like.

These rulings indicate the comprehensiveness of the *Sharî`ah* that observes and protects the rights of the embryos. Then, all praise is due to Allah, Lord of the worlds, for His granting us this just and comprehensive *Sharî`ah*. We ask Allah to help us adhere to His *Sharî`ah* and be sincere to Him in religion, although the disbelievers dislike it.

Concerning the non-pregnant widow, her waiting period is four months and ten days, whether her husband has died before or after the consummation of marriage, and whether she is fit to have sexual intercourse or not. This is because Allah, Exalted be He, says:

> ***"And those who are taken in death among you and leave wives behind – they, [the wives, shall] wait four months and ten [days]..."*** (Qur'ân: Al-Baqarah: 234)

Ibnul-Qayyim said:

> *"The waiting period prescribed for the widow is obligatory, whether her marriage has been consummated or not, according to the generality of the legal texts in the Noble Qur'ân, the Sunnah (Prophetic Tradition) as well as the unanimous agreement of Muslims. The waiting period for the widow is not merely intended for making sure of pregnancy nor is it an absolute act of worship, since every ruling in the Sharî`ah has its wisdom which is understandable to some and ambiguous to others."*[4]

Al-Wazîr and other scholars stated, *"Scholars unanimously agree that the waiting period for the non-pregnant widow is four months and ten days."*[5]

As for the widowed slave girl, she must observe half the waiting period of the free widow; that is two months and five days (including five nights). This is because the Prophet's Companions (may Allah be pleased with them all) unanimously agreed that the divorced slave girl must observe half the waiting period prescribed for the free divorced woman, and so is the ruling on the widowed slave girl compared to that on the free widow. **Al-Muwaffaq Ibn Qudâmah** said, *"This is the view of the majority of scholars, such as Mâlik, Ash-Shâfi`î, and Scholars of Interpretative Opinions."*[6] **Al-Muwaffaq Ibn Qudâmah** also said in his book entitled *Al-Mubdi`* (*the Creative*):

> *"The Companions unanimously agreed that the widow slave girl must observe half the waiting period prescribed for the free widow woman; otherwise, the verse states a general ruling concerning both the salve and free women."*[7]

There are some Rulings pertaining to the Widow

The widow must spend her prescribed waiting period in the house where she was staying at the death of her husband, and it is impermissible for her to leave this house except for a legal excuse, as the Prophet (PBUH) said to a widow:

> *"Stay at your home."*[8]

In another narration, he (PBUH) said:

> *"Stay during your waiting period in the house where you were informed of your husband's death."*[9]
>
> (Related by the Compilers of the *Sunan*)[10]

However, if the widow is obliged to move into another house, she is permitted to go wherever she desires in order to avert any harm. For example, she can leave the house if she fears for herself from staying there or is forced to leave it, or if the house is rented and its owner asks her to leave or asks for a higher rent.

It is permissible for the widow to go out from her house for her needs during the daytime, not at night when evil incidents are expected, for the Prophet (PBUH) said to the widows observing waiting periods:

> *"Talk as much as you want at the home of one of you and when you want to sleep, then everyone of you should return to her home."*[11]

Moreover, it is obligatory for the widow to show the signs of her mourning by avoiding all that which may arouse others' desire towards her or make her attractive to look at. With regard to this, the great scholar **Imâm Ibnul-Qayyim** (may Allah have mercy on him) said:

> *"This (the widow's mourning over her late husband) indicates the perfection and wisdom of the Islamic Sharî`ah (Islamic Law) and how it thoroughly looks after the interests of Muslims. Mourning the deceased signifies the big disaster of death which people used to exaggerate excessively during the Pre-Islamic Period of Ignorance (the Jâhiliyyah). During such days, the widow used to stay in the worst and smallest house, without touching perfumes, applying oil to her body, taking a bath or suchlike acts that indicate dissatisfaction with the Divine Predestination. Out of His mercy, Allah, Exalted be He, has nullified this way of mourning observed by the people of the Pre-Islamic Period of Ignorance (the Jâhiliyyah), and substituted*

patience, thankfulness, and turning back to Allah by saying 'Indeed, we belong to Allah and indeed to Him we will return.' Since the disaster of death naturally causes pain and sadness to the people of the deceased, Allah, the Wise, the Acquainted, allows them (the relatives other than the wife) to show only a few signs of mourning, that last for three days only in order to provide them with comfort and release their sadness. So, mourning is prohibited after these three days as it is considered a prospective evil. What is meant here is that Allah permits women to mourn over their deceased, other than the husband, for three days. However, mourning over the husband is related to the waiting period as it is considered of its necessities and complementary practices."

As for the pregnant widow, she ends her obligatory mourning as soon as she gives birth to her child. Her mourning is restricted to her waiting period and is complementary to it, and one of its rulings and obligations. Therefore, her mourning is obligatory as long as she is still in her waiting period.

Imâm Ibnul-Qayyim then said:

"A woman needs to adorn herself to be lovely for her husband. When he dies and she is still in her waiting period and cannot be the wife of another man, she must be prevented from doing what a woman does for her husband, in order to observe the right of the deceased husband by preventing herself from another man until the decreed waiting period ends. This also helps block the means to desire men or be desired by men if she adorns herself."[12]

Therefore, the widow in her waiting period must avoid adorning herself by applying dyes, henna, and the like. She must not wear any jewelry, apply any perfume, or wear any adorned clothes, as she has to wear only unadorned ones. However, there is no special clothing for the mourning period, and hence the widow can wear her usual clothes except the adorned ones. When her waiting period is over, she has no legal obligation to say or do anything, unlike what some common people think.

The waiting period prescribed for the woman who no longer expects menstruation is three months, for Allah, Exalted be He, says:

"And those who no longer expect menstruation among your women – if you doubt, then their period is three months..."

(Qur'ân: Aṭ-Ṭalâq: 4)

The prescribed waiting period for a divorced woman, who is not pregnant and still has menstrual periods, is three menstrual periods, for Allah, Exalted be He, says:

> ***"Divorced women remain in waiting [i.e., do not remarry] for three periods, and it is not lawful for them to conceal what Allah has created in their wombs..."*** (Qur'ân: Al-Baqarah: 228)

This noble verse indicates that the divorced woman must observe a waiting period of three menstrual periods, and then she can remarry if she likes. The word "periods" mentioned in the verse refers to menstrual periods, as narrated from `Umar Ibnul-Khaṯṯâb, `Alî Ibn Abû Ṯâlib, and Ibn `Abbâs (may Allah be pleased with them all). The Prophet (PBUH) used the same word to refer to the same meaning as he (PBUH) said to a woman in a state of *istihâḏah* (i.e. a woman having vaginal bleeding other than menstruation):

"...When your menstruation comes, do not perform prayer."[13]

Moreover, these three menstrual periods must be complete, and thus if the woman is divorced during her menstrual period, this period will not be counted as one of the three menstrual periods prescribed for her as a waiting period. It is worth mentioning that though divorce is prohibited during the menstrual period, it is legally valid.

The prescribed waiting period for the divorced slave girl is only two menstrual periods, for the Prophet (PBUH) said:

"The waiting period of the slave woman is two monthly periods."

This is the opinion of `Umar, his son (`Abdullâh Ibn `Umar), and `Alî Ibn Abû Ṯâlib, and no one of the Prophet's Companions opposed this opinion. Thus, this ruling makes an exception of the generality indicated by the Qur'anic verse, ***"Divorced women remain in waiting [i.e., do not remarry] for three periods..."*** (Qur'ân: Al-Baqarah: 228) According to the analogical deduction, the waiting period of the slave girl is half that of the freewoman[14] i.e., one and half menstrual periods. Yet, as the menstrual period cannot be divided, thus the waiting period of the slave girl is two menstrual periods.

As for the divorced woman who does not have a monthly menstrual period due to menopause or young age, her waiting period is three months. This is according to the noble verse, ***"And those who no longer expect menstruation among your women - if you doubt, then their period is three months, and [also for] those who have not menstruated..."*** (Qur'ân: At-Talâq: 4)

With regard to this, **Imâm Muwaffaqud-Dîn Ibn Qudâmah** and other scholars stated that:

> *"Muslim scholars unanimously agree that the waiting period prescribed for the menopausal freewoman and for the young freewoman, who has not menstruated yet, is three months."*[15]

As for the woman who has reached the age of puberty but has not menstruated yet, her waiting period is to be the same as the menopausal woman, as she is included in the verse: ***"...and [also for] those who have not menstruated..."*** (65: 4) When the menopausal divorced slave woman or that who has not menstruated is the mother of a child of her master, her waiting period is two months, for `Umar (may Allah be pleased with him) said:

> *"The waiting period prescribed for the divorced slave girl who has begotten a child to her master is two menstrual periods. If she has not menstruated, her waiting period is two months."*[16]

This is because the months substitute for the menstrual periods. Some scholars maintain that waiting period of such a woman is only one and half months. Their proof of this is that the waiting period prescribed for the slave girl is half that observed by the freewoman, and the waiting period for the freewoman who has not menstruated is three months; thus, the menopausal slave woman is one month and a half.

Concerning the divorced woman who used to menstruate but suddenly stops menstruating not because of old age, she has two cases:

The first case is when she does not know the cause that prevents her menstrual period, and hence, she is to observe a waiting period of one year: nine months for pregnancy and three months for the waiting period prescribed for the menopausal woman. **Ash-Shâfi`î** (may Allah have mercy on him) said:

> *"This is the judgment of `Umar issued among the Muhâjirûn*[17] *and the Anṣâr, and none of them denied it. The reason behind legislating such waiting period is to make sure that the woman is not pregnant, and when nine months pass, it becomes certain that she is not pregnant. Then, she is to observe the waiting period prescribed for the menopausal woman, i.e., three months. The total waiting period is thus twelve months, during which it will be certain that she is not pregnant and that the three months supposed to be for menstruation have passed."*

The second case is when such a woman knows the cause that prevents her menstrual period, such as illness, breastfeeding, or taking a medicine that prevents menstruation. In this case, she is to wait until the cause no longer exists, and then if she menstruates again, she is to observe a waiting period of three menstrual periods. However, if she does not menstruate, she is to observe a waiting period of one year just as the woman who does not know the cause that prevents her menstrual period, according to the most preponderant view. This is the opinion of Shaykhul-Islâm Ibn Taymiyah and one of the opinions related about Imâm Ahmad.

There are some cases pertaining to the mustahâdah[18]**:**

The first case is when she knows her time and habit of menstruation before *istihâdah*[19]. Then, her waiting period must equal three menstrual periods according to her usual pattern.

The second case is when she forgets the duration of her menstrual period before the *istihâdah*, but she distinguishes her menstrual blood (from the blood of *istihâdah*); thus, she must consider her menstruation period relying on the distinction between the menstrual blood and that of *istihâdah*.

The third case is when she forgets the time of her menstruation and she cannot distinguish her menstrual blood, then she is to observe the same waiting period of a menopausal divorced woman, namely three months.

One of the rulings pertaining to the waiting period is the marriage proposal to a woman observing her waiting period. It is prohibited to propose frankly to the widow or the irrevocably divorced woman as long as any of them is observing her waiting period. For example, a man is prohibited to say to such a woman something like, "I want to marry you." However, he can allude concerning a proposal to her, such as when he says, "I want to marry someone like you", for Allah, Exalted be He, says, ***"There is no blame upon you for that to which you [indirectly] allude concerning a proposal to women..."*** (2: 235)

In addition, it is permissible for the man to propose, whether frankly or indirectly, to his revocably divorced wife during or after her waiting period, since he is permitted to take back his revocably divorced wife during her waiting period or remarry her after her waiting period.

As for the wife of a missing man who has disappeared and it is not certain that he is alive, she is to wait a sufficient period, set by the judge, for him to come back or until something certain is known about him. During this period, she is still considered his wife, since the principle acted upon in this case is that he is considered alive. When this period expires, he is legally considered a dead person, and his wife is to observe the waiting period prescribed in case of death, which is four months and ten days. This is the judgment the Companions (may Allah be pleased with them all) gave in such a case. **Imâm Ibnul-Qayyim** said:

> "*...The Rightly-guided Caliphs gave judgments concerning the wife of a missing man as narrated about 'Umar Ibnul-Khattâb. Imâm Ahmad Ibn Hanbal said, 'I do not doubt this ruling, for five of the Companions ordered the wife of the missing man to observe the waiting period prescribed for the widow.'* "[20]

Imâm Ibnul-Qayyim added, "*The opinion of 'Umar is the most preponderant view by means of analogical deduction, and Shaykhul-Islâm Ibn Taymiyah said, 'This is the soundest opinion.'* "

When the waiting period of the wife of a missing man expires, she is permitted to marry another man, and she does not need to get a divorce from the guardian of her missing husband. If she remarries and then her first husband returns, he has the option to take her back or approve of her second marriage and restore his dowry, according to the preponderant view, whether his return is before or after the consummation of her marriage to the other man. With regard to this, **Shaykhul-Islâm Ibn Taymiyah** (may Allah have mercy on him) said:

> "*The soundest ruling on the wife of a missing man is the judgment of 'Umar and some other Companions; she must wait four years, then observe the waiting period prescribed for the widow. After completing her waiting period, she is permitted to marry another man. If her first husband returns after she has married, he has the option to take her back or to restore his dowry, whether his return is before or after the consummation of her marriage to the other man. And this is the opinion acted upon in the Hanbali School.*"

He added, "*Giving the man the option of taking back his wife or restoring his dowry is the most preponderant view.*"[21]

Endnotes

1 Ibn Mâjah (2077) [2/531].
2 This is the waiting period of the non-pregnant widow.
3 See: *Al-Mughnî* (11/234).
4 See: "*Zâdul-Ma`âd*" (4/206).
5 See the footnote in "*Ar-Rawd Al-Murbi`*" (7/55).
6 See: "*Al-Mughnî*" [9/107].
7 See the footnote in "*Ar-Rawd Al-Murbi`*" [7/56].
8 Abû Dâwûd (2300) [2/500], At-Tirmidhi (1204) [3/509], An-Nasâ'î (3528) [3/510], and Ibn Mâjah (2031) [2/506].
9 Ibn Mâjah (2031) [2/506] and An-Nasâ'î (3529) [3/511].
10 The *Sunan* refers to compilations of the Prophetic *hadîths* classified according to the Islamic jurisprudential subjects; the main four compilers of the *Sunan* are Abû Dâwûd, Ibn Mâjah, At-Tirmidhî and An-Nasâ'î.
11 Al-Bayhaqî (15512) [7/717].
12 See "*I`lâm Al-Mwaqi`în*" [2/165].
13 Abû Dâwûd (280) [1/139], An-Nasâ'i (211) [1/131], and Ibn Mâjah (620) [1/343].
14 This is because the *diyah* (blood money) of a slave girl is half that of a freewoman and, likewise, the punishment a slave girl receives is half that of a freewoman.
15 See "*Al-Mughnî*" [11/265].
16 Ad-Daraqutnî (3785) [3/214), Al-Bayhaqi (15451) [7/698], and `Abdur-Razzâq (12872) [7/221].
17 The *Muhâjirûn*: The Emigrants; those Muslims who emigrated from Mecca to Medina for being persecuted in Mecca because of embracing Islam.
18 *Mustahâdah*: A woman in a state of *istihâdah* (i.e. a woman having vaginal bleeding other than menstruation).
19 *Istihâdah*: Vaginal bleeding other than menstruation.
20 See "*I`lâm Al-Muqi`în*" (2/53).
21 See " *Majmu`ul-Fatâwâ*" (10/377—381).

CHAPTER 10

Verifying the Slave Girl's Non-Pregnancy

Verifying that the slave girl is not pregnant is achieved by her master abstaining from having sexual intercourse with her for a specified period sufficient to make sure that she has not conceived. Thus, when a slave girl is sold, given as a gift or captured and she is fit to have sexual intercourse, her new master is prohibited to have sexual intercourse with her or even foreplay until making sure that she is not pregnant, for the Prophet (PBUH) said:

> *"It is not lawful for a man who believes in Allah and the Last Day to water what another has sown (meaning having sexual intercourse with a pregnant woman)."*[1]
>
> (Related by Ahmad, At-Tirmidhi and Abû Dâwûd)

In another narration related by Abû Dâwûd, the Prophet (PBUH) said:

> *"No one should have sexual intercourse with a pregnant woman (from a previous man) until she gives birth."*[2]

The period of verifying the pregnancy of a slave girl lasts until she gives birth, due to the generality of the Qur'anic verse:

> ***"...And for those who are pregnant, their term is until they give birth..."*** (Qur'ân: At-Talâq: 4)

The period of verifying the non-pregnancy of the non-pregnant slave girl who menstruates is only one menstrual period, as the Prophet (PBUH) said about the enslaved women of Awtâs[3]:

> *"No one should have sexual intercourse with a pregnant woman (from a previous man) until she gives birth, nor should anyone have sexual intercourse with a non-pregnant woman until a menstrual period passes."*
>
> (Related by Ahmad and Abû Dâwûd)

This *hadith* indicates the obligation of verifying if the slave girl is pregnant or not, whether captured or not, before having sexual intercourse with her. Moreover, this *hadith* illustrates how to verify the pregnancy of the pregnant slave girl and that of the menstruating one.

As for the menopausal slave girl or one who is still young and has not menstruated yet, she needs one month to verify her pregnancy, since one month substitutes for one menstrual period in counting the waiting period.

The wisdom behind the prescription of verifying the pregnancy or the non-pregnancy of the slave girl is implied in the *hadith* in which the Prophet (PBUH) says:

> *"It is not lawful for a man who believes in Allah and the Last Day to water what another has sown (meaning having sexual intercourse with a pregnant woman)."*

This indicates that the objective of verifying the pregnancy is to avoid any possible confusion concerning the lineage of the offspring.

Endnotes

1 Abû Dâwûd (2158) [2/425] and At-Tirmidhi (1133) [3/437].
2 Abû Dâwûd (2157) [2/424].
3 The place where the Battle of Hunayn took place.

VIII: BREASTFEEDING

CHAPTER

1

Breastfeeding

Allah, Exalted be He, says concerning women one is forbidden to marry (temporarily or perpetually):

> ***"...your [milk] mothers who nursed you, your sisters through nursing..."*** (Qur'ân: An-Nisâ': 23)

This is also demonstrated in the Prophetic *hadiths* as it is related in the two authentic books of Al-Bukhârî and Muslim that the Prophet (PBUH) said:

> *"All things which become unlawful because of blood relations are unlawful because of the corresponding foster breastfeeding relations."*[1]

He (PBUH) also said in a *hadith* related by the Group of Compilers of *Hadith*:

> *"What is unlawful because of blood relations is also unlawful because of the corresponding foster breastfeeding relations."*[2]

Linguistically, breastfeeding refers to sucking milk at the breast or drinking it (when milked in a container). Jurisprudentially, the term refers to sucking milk at the breast or drinking it in another way by a child less than two years of age provided that the milk results from pregnancy.

As for the rulings on foster breastfeeding relations, they are treated like blood relations in marital affairs, being alone with a woman, being a *mahram* (a woman's husband or any unmarriageable kin of hers) and the permissibility of exchanging looks, which will be demonstrated in detail later, if Allah wills. However, there are two conditions the fulfilling of which renders the rulings on blood relations applicable to foster breastfeeding relations:

The first condition: The nursed baby must have five sucks or more, for 'Â'ishah (may Allah be pleased with her) narrated:

> *"It had been revealed in the Glorious Qur'ân that ten clear sucks make the marriage unlawful, then it was abrogated (and substituted) by five sucks and Allah's Messenger (PBUH) died while it (i.e. the verse indicating five sucks) was still recited as a verse of the Qur'ân (for some Muslims were unaware that it was also abrogated.)"*[3]
>
> (Related by Imâm Muslim)

The abrogation here is applicable only to the recitation and not to the juristic ruling. This narration gives more elaboration to the general meaning of the above-mentioned verse and *hadîth* as far as nursing is concerned.

The second condition is that the nursed baby is to be breastfed five sucks (or more) during the nursing period which is two years, for Allah, Exalted be He, says:

> ***"Mothers may nurse [i.e., breastfeed] their children two complete years for whoever wishes to complete the nursing [period]..."***
>
> (Qur'ân: Al-Baqarah: 233)

This verse signifies that the breastfeeding meant here is the one which takes place during the two years of nursing. This is also asserted in a *hadîth* in which the Prophet (PBUH) says:

> *"The only breastfeeding which makes marriage unlawful is that which is taken from the breast and enters the bowels, and is taken before the time of weaning."*[4]

At-Tirmidhî says, *"This is a hasan (good) sahîh (authentic) hadîth."* This *hadîth* means that the nursing which prohibits marriage is that which the

nursed baby gets into his bowels in a way that nurtures him and makes his bowels grow and enlarge. Thus, the little insignificant nursing that does not enter the bowels of the nursed baby nor render them wide does not prohibit marriage. Besides, the nursing which prohibits marriage and to which the rulings on blood relationships are applied is that which takes place before the weaning. That is to say, the prohibiting nursing (prohibiting marriage and other affairs) is the one occurring while the nursed baby is still taking his nourishment only by breastfeeding; only milk which makes his flesh grow and thus becomes a part of him (in the form of flesh and bones).

It is considered a suck when the nursed baby starts sucking milk at the breast then stops for breathing or sucking another breast or for another reason. If he returns to the same breast afresh after that pause, it is considered two sucks even if this occurs at one time. This is because the Lawgiver has defined a certain number for the prohibiting nursing and not the way of nursing itself. It is rather determined to be a suck according to the commonly acknowledged customs.

If the milk enters the abdomen of the nursed baby without being sucked, by way of letting it fall in drops into his mouth or nose or by drinking it from a container and the like, it is then treated as being sucked at the breast as far the juristic ruling is concerned. This is because the nursed baby takes nourishment from it that way the same as done in breastfeeding, provided that he sucks five times.

As for prohibited things due to nursing, the nursed baby is considered as the son of his wet nurse since the latter has breastfed him at least five times when he has been under the age of two. Thereby, it is prohibited for her to marry him, and he is a *mahram* for her, in consideration to what Allah, Exalted be He, says:

"...your [milk] mothers who nursed you..."

(Qur'ān: An-Nisā': 23)

Thus, it is allowed for the foster-son to look at his foster-mother and be alone with her. However, the foster son is not regarded as the son of the wet nurse regarding the other rulings; he is not obliged to provide her sustenance, they are not entitled to inherit each other, he is not to pay the blood-money on her behalf if she kills or injures some person, and he is not empowered to act as her legal guardian. This is because blood relationships are stronger than that resulting from nursing. Yet, both relationships are not to be treated alike as far as juristic rulings are concerned except in matters stated in a Qur'anic or a Prophetic text, such as being prohibited to one's foster-mother in marriage, being lawful to look at each other and being alone with each other.

The nursed baby is regarded as the son of the man to whom the milk of the foster-mother is ascribed to have been caused by him by way of pregnancy or sexual intercourse through marriage or the like, since her pregnancy is ascribed to him and nursing is one of its results. Thereby, the nursed baby is regarded as the son of the foster-father, and the same rulings that concern the foster-mother apply to the foster-father. That is, it is prohibited for the foster-father to marry his foster-daughter, yet it is permissible to look at her, be alone with her and be her *mahram*, but she is not regarded as his daughter in other rulings.

Besides, all the *mahrams* of the foster-father –his fathers, children, mothers, grandfathers, grandmothers, brothers and sisters and their children, his paternal uncles, his paternal aunts, his maternal uncles and maternal aunts – are *mahrams* for the nursed baby. Likewise, all the *mahrams* of the foster-mother – her fathers, children, mothers, sisters, maternal aunts, paternal aunts and the like are his *mahrams*.

Since nursing makes it prohibited for the foster-father (or mother) to marry the nursed person, beside the rulings on marital affairs, all of these rulings apply to the children of the foster child, his grandchildren, but not to his fathers, mothers, paternal uncles, paternal aunts, maternal uncles and maternal aunts nor to his brothers and sisters.

If a baby breastfeeds at the breast of a woman who is married through an invalid marriage contract or a woman who has committed adultery, he is to be ascribed only (as a foster child) to the foster-mother, since his paternity has not been established from family relationship (his father is unidentified). As paternity is not established through a blood relation, it is not established from nursing, for nursing is a branch of paternity.

If two children (a male and a female) have breastfed from the milk of a milch animal, this is not a prohibiting nursing.

Scholars disagree as to the case of the child being nursed from a woman who may breastfeed without being pregnant or having sexual intercourse, whether this nursing is a prohibiting one or not. Some scholars maintain that it is not a prohibiting nursing, since her milk is not a real one (not resulting from having sexual intercourse), but rather a biological, unnatural one. Besides, real milk is the one sucked from a female breast making the bones and the flesh of the nursed baby grow, while this milk does not do this. Other scholars, such as Al-Muwaffaq and others, are of the view that this nursing is a prohibiting one.

Breastfeeding is confirmed by a testimony of an upright woman. In this regard, **Shaykhul-Islâm Ibn Taymiyah** says:

> *"...If this woman is known to be truthful, and has mentioned that she has breastfed a certain baby (under the age of two) five times, her testimony is acceptable according to the soundest view, and the rulings on nursing are applicable in this case."*[5]

If the nursing is not confirmed, or the sucks are doubted to be five or less and there is no evidence proving the contrary, then there is no prohibition. This is because the original ruling is that there is no nursing. And, Allah, Exalted be He, knows best.

Endnotes

1 Al-Bukhârî (2645) and Muslim (1447).
2 Al-Bukhârî (2646) [5/312] and Muslim (3554) [5/260].
3 Muslim (3582) [5/271].
4 At-Tirmidhî (1154) [3/458].
5 See: '*Majmu`ul-Fatâwâ*' (34/52).

CHAPTER 2

Custody

Jurisprudentially, custody is the protection of a child or a mentally ill adult and the like, preventing any harm from befalling him, bringing him up through seeing to his physical and moral needs.

The wisdom behind custody is manifest; the child and those of his case (lacking discernment, such as the insane and the lunatic person) are unable to manage their own interests. Therefore, they need a guardian to take care of them by protecting them from any harm, bringing about whatever is useful for them and bringing them up in the proper way.

The *Sharī'ah* (Islamic Law) has decreed custody, and it is in fact a divine mercy through which the affairs of the wards are conducted, a way to do them the power of good. If the wards are left without being taken care of, they will be lost. As Islam is the religion of mercy, solidarity, and consolation, it enjoins Muslims to show mercy to them, take care of them and solace them. Islam also forbids Muslims from leaving such persons without a guardian and makes it

obligatory upon Muslims to provide for them. Moreover, it is a right of the ward to be cared for by his relatives, and it is at the same time a duty upon the guardian to take care of him as in the case of guardianships.

Custody is Obligatory upon Guardians in the Following Order

The person most entitled to have the custody of a child is the mother. In this concern, **Imâm Muwaffaqud-Dîn Ibn Qudâmah** (may Allah have mercy on him) says:

> *"If the husband and the wife are legally separated and they have a child (ward or insane whether male or female), his/her mother has the best right to have custody, if she fulfills the conditions necessary for the person to have custody over a child. This is the view maintained by Imâm Mâlik and the scholars known for personal interpretative judgments, and it has not come to my knowledge that there is a contrary opinion."*

A woman has no right of the custody (of her child from a previous marriage) when she marries (another person), and the child's custody in such a case automatically devolves to the next most eligible person. This is because once a woman came to the Messenger of Allah (PBUH) and said:

> *"O Messenger of Allah! My womb was a vessel to this son of mine, my breasts were a means of quenching his thirst, and my lap was a place of protection for him. Yet, his father has divorced me, and wants to take him away from me." The Prophet (PBUH) said, "You have more right to him as long as you do not marry (another person)."*[1]
>
> (Related by Imâm Ahmad, Abû Dâwûd, and Al-Hâkim who deems it a *sahih* (authentic) *hadith*)

The *hadith* signifies that the mother has the best right to have custody of the child if her husband (the child's father) divorces her and wishes to have him under his custody. It also signifies that if the mother marries another person, she is no more entitled to be the child's guardian.

The mother takes precedence in having the child in her custody since she is tenderer toward the child than his closest relative. None shares her closeness of blood relationship except the child's father, yet his tenderness is less than hers. In case the child's father is entitled to have custody over the child, he would let his present wife take care of him. The child's mother has the best right than

the husband's wife to have the child under her custody. In this connection, Ibn 'Abbâs (may Allah be pleased with him) once said to a man:

> *"Her (the mother's) smell, bed and lap are better for your son until he reaches the age of discretion and is given choice as to which of his parents he wants to stay with."*

In this regard, **Shaykhul-Islâm Ibn Taymiyah** says:

> *"The mother has more right to have custody over her child than the father, since she is closer to the child than his father, as she knows best about his nourishment, carrying him, lulling him to sleep and giving him things to play with and the like. Moreover, the mother knows better about her child, and is more merciful, capable, patient with him/her than anyone else. Therefore, she is specifically designated, according to Shari'ah, to have custody over her undiscriminating child."*[2]

However, when a mother's right to the custody of her child is lost, it devolves to her mother (the child's maternal grandmothers in ascending lineage) according to their closeness to the child. This is because they are regarded as the child's mother, for they are the persons who have begot the child's mother, and whose mercy to the ward is more ensured than others.

Then the father, to whom the child's existence is ascribed, is given precedence over other relatives concerning the custody of his child (after the child's maternal grandmothers), for he is closer and more loving to him than others.

After that, the right of the custody of the child devolves to the paternal grandmothers for they are among the child's agnate relatives. They are preferred to grandfathers, for when there are some persons with the same degree of relation to the child, the woman is more entitled to take precedence, for she is closer to the child. This is the same as in the case of the father and the mother.

The right of custody devolves then to the child's paternal grandfathers, according to their closeness to the child, for they are regarded as the ward's father.

Then, the right of custody devolves to mothers of grandfathers (mother of the maternal grandfather then mother of the paternal grandfather), for they relate to the ward by his/her grandfather and they have begotten the ward's grandfather. Thus, the ward is regarded as part of their lineage.

After that, the ward's sisters have the right of the custody of the ward, for they relate to him/her by both or either parents. So, the full sister is given precedence over half sisters, for she has priority in inheritance. The

half maternal sister comes next in having the right of the ward's custody, for she relates to his/her mother who is given precedence over the father as far as the right of custody is concerned; then the half paternal sister. However, some scholars maintain a reasonable opinion that the half paternal sister takes precedence over the maternal one, for the position of authority is for the father's side. They also say that the paternal father is more entitled to inheritance than the maternal sister, since she is regarded as a full sister in case the full sister is absent.

The right of custody then devolves to maternal aunts for their relation to the ward's mother. In this regard, it is narrated in the Two Authentic Books of Al-Bukhâri and Muslim that the Prophet (PBUH) said:

"The maternal aunt is of the same status as the mother."[3]

However, the mother's full sister takes precedence, then the mother's maternal sister, then the mother's paternal sister, as in the sisters' case.

The paternal aunts then have the right of custody for their relation to the ward's father, who comes after the mother as far as the right of custody is concerned. In this regard, **Shaykhul-Islâm Ibn Taymiyah** (may Allah have mercy on him) says:

"The paternal aunt is more entitled to the right of the custody of the ward than the maternal aunt, the same is true with the paternal female relatives who take precedence over the maternal ones, for the father has the upper hand and so the same will be with his close relatives. The mother takes precedence over the father in having the custody of the child, for she is the best one to see to the child's interests than anyone else. In this concern, the lawgiver gave precedence to the maternal aunt of Hamzah's daughter over her paternal aunt Safiyyah, for the latter did not claim the custody of the ward while Ja`far (the husband of the ward's maternal aunt) claimed it on behalf of his wife (the ward's maternal aunt). Thus, the Prophet (PBUH) judged that Hamzah's daughter is to be in the custody of her maternal aunt while she (the aunt) was absent."[4]

Shaykhul-Islâm Ibn Taymiyah (may Allah have mercy on him) also says:

"All the principles of the Shari`ah approve that the father's relatives are to take precedence over those of the mother in having custody of the ward. Thus, whoever does the opposite breaches these principles and the Shari`ah."

After the ward's paternal aunts, the right of custody devolves to the ward's brothers' daughters, then to the sisters' daughters, then to the paternal uncles' daughters, then to the paternal aunts' daughters, then to the rest of closest agnate relatives to the ward. This must be according to their relation to the ward; the closer takes precedence, as follows: brothers, their sons, paternal uncles, then their sons (cousins).

If the ward is a female, the person who is entitled to have her custody must be one of her *mahrams*. If he is not from her *mahrams*, he should entrust her to some trustworthy woman he chooses for the ward.

Endnotes

1 Ahmad (6707) [2/182], Abû Dâwûd (2276) [2/490], and Al-Hâkim (2889) [2/247].
2 See: '*Majmu'ul-Fatâwâ*' [17/216-218]
3 Al-Bukhârî (2699) [5/373].
4 See: '*Majmu'ul-Fatâwâ*' (34/122).

CHAPTER

3

Causes Preventing Custody

The right of custody may be taken away due to the following reasons:

Slavery: A slave is not allowed to have the custody of a ward, for custody is a position of authority to which a slave is not entitled. This is because a slave is always busy serving his master and totally devoted to his benefits.

Disobedience: A defiantly disobedient person is not entrusted to the custody of a ward for fear that he may render harm to the ward by badly raising him/her according to the same evil manners.

Likewise, a **disbeliever** is not entitled to take a ward in custody, for he causes much harm to the ward by turning him/her away from Islam by raising him/her according to the teachings and manners of disbelief.

Moreover, the woman who is married to someone who is not among the agnate relatives of the ward is not entitled to take the custody of the ward. This is because the Prophet (PBUH) once said to a child's mother:

"You have more right to him as long as you do not marry."

This is because she is entirely devoted to her husband who has the right to prevent her from looking after the ward. Thus, if the woman is married to someone from amongst her ward's relatives, she still has the right to the custody of the ward.

However, if the aforementioned causes are eliminated, those who are prevented from having custody of a ward may take this right. To elaborate, if the slave is set free, the disobedient person repents, the disbeliever embraces Islam or the remarried woman is divorced, then either of them will be entitled to take the custody of the ward. This is because there is no cause preventing taking it in such cases.

If one of the parents of the ward wishes to travel a long journey in order to stay in a distant place, intending no harm to the other party, then the father is more entitled to take the custody of the child. It does not make any difference whether the father is the one traveling or the one staying behind in the homeland. It is also stipulated that the way and the place this one is traveling to be safe. This is because the father is the one who undertakes disciplining and protecting him/her as best as possible. So, if the father were to be away from his child, he would not be able to undertake this duty and thus the child would be lost.

On the contrary, the mother is more entitled to the custody of her child if either of the parents travels to live in a near place, the distance of which is less than that of shortening prayer. It does not make any difference whether the mother is the one traveling or the one staying behind. This is because she is more merciful to the ward and in such a case the ward's father can look after him/her.

However, if the travel was for a certain purpose after fulfilling which the one traveling will return, then the ward is to be kept in the custody of the one staying behind of either of the parents. This also is to be applied in case the place of travel or the way is perilous. This is because taking the ward along in such cases may cause harm to him/her. With regard to this, **Imâm Ibnul-Qayyim** (may Allah have mercy on him) said:

> *"It is a trick contradicting what the Lawgiver intends that a father intentionally travels to take his child away from his/her mother to deprive her from the right of the child's custody. The Lawgiver decreed that the mother is more entitled to have the custody of her child than the father in case they live near each other and it is possible for them (the father and the child) to meet at any time..."*[1]

Ibnul-Qayyim then added:

"The Prophet (PBUH) said that whoever separates a mother and her child, Allah will separate him from his beloved persons on the Day of Resurrection. Moreover, the Prophet (PBUH) forbade selling a slave woman alone without her child or vice versa, even if they are both in the same town. Thus, it is more deserving to be forbidden that a father makes a trick to separate between a mother and her child in such a way that it becomes hard for the mother to see, meet and bear the absence of her child. This is too hard for her; thus, the judgment of Allah and His Messenger is the worthiest to be followed: the mother is more entitled to have the custody of the child, whether the father travels or stays at home. To illustrate, the Prophet (PBUH) said to a woman, 'You have more right to him as long as you do not marry.' Therefore, how is it reasonable to say that the mother is more entitled to have the custody of her child as long as the child's father does not travel? Surely, this view is not supported by any evidence from the Glorious Qur'ân, the Sunnah (Tradition) of the Messenger of Allah (PBUH), the fatwas[2] of the Prophet's Companion or the authentic analogical deduction."

The Child's Right to Choose between His/Her Parents

'Umar and 'Alî (may Allah be pleased with them both) decreed that a child, at the age of seven and being sane, can choose to stay with either parents. This view is asserted by the hadîth related by At-Tirmidhî and other compilers on the authority of Abû Hurayrah who narrated:

"A woman came to the Prophet (PBUH) and said, 'My husband wants to take away my son (after divorcing me).' The Prophet (PBUH) said to the child, 'This is your father and this is your mother, so take the hand of any of them whom you like most.' The boy took his mother's hand and she went away with him."[3]

The aforesaid *hadîth* signifies that a child, if able to discern, is to be given the choice to stay with either parent (in case of divorce). When a child reaches the age of discrimination and leans to either parent, this means that the one chosen is more merciful to the child than the other. The child is only given such a choice when two conditions are fulfilled:

First: Both parents must be entitled to have the custody of the child.

Second: The child must be sane and if not so, s/he is to stay with the mother who is more merciful to him/her and knows better about his/her interests.

If a sane child chooses the father (as guardian), s/he stays with him day and night, to protect, instruct and educate him/her. However, a father is not allowed to prevent the child from visiting his/her mother, for this may render the child undutiful and make him/her sever ties of relationship. If a child chooses the mother, s/he is to spend the night with her and the day with his/her father in order to educate him/her. If a child chooses neither of the parents, then lots are to be drawn in order to see who receives the custody of him/her, as this is the only way to prefer one to the other.

The father is more entitled to have the custody of his daughter once she is seven, for he is more able to protect her and has more right than anyone else to be her guardian and this is to continue until she is married. However, the mother is to be permitted to visit her daughter in case no evil might happen[4]. If the father is not able to protect his daughter or that he neglects her due to his being busy or impious, while her mother is apt to preserve her well, then the daughter is to stay with her mother.

Shaykhul-Islâm Ibn Taymiyah (may Allah have mercy on him) says:

"Imâm Ahmad and his followers give the father precedence over the mother with regard to the custody of their daughter in case this does not cause her any harm. If the father is not able to protect his daughter or that he neglects her due to being busy and the mother is able to take care of her and protect her, then she (the mother) is to take precedence over the father in regard to their daughter's custody. Thus, if the daughter may not be safe with one of the two parents, then the other parent is surely more entitled to keep her in his/her custody."[5]

Shaykhul-Islâm Ibn Taymiyah, (may Allah have mercy on him) also said:

"If the father marries another woman who causes harm to his daughter and neglects the girl's interests while the mother observes the girl's interests and does not hurt her, then definitely the mother has more right to have the custody of the daughter."

And Allah knows best.

Endnotes

1 See: '*I'lâm Al-Mûwqqi'in*' (2/295).

2 *Fatwa:* A legal opinion issued by a *mufti* [A Muslim scholar specialized in issuing legal rulings] in response to a layman's question on a point of the Islamic Law.

3 Abû Dâwûd (2277) [2/490], At-Tirmidhi (1361) [3/638], An-Nasâ'i (3496) [3/497], and Ibn Mâjah (2351) [3/111].

4 This is because after divorce, it is not allowed that the mother be in privacy with the father.

5 See: '*Majmû'ul-Fatâwâ*' (34/131).

CHAPTER

4

The Wife's Alimony

Jurisprudentially, alimony refers to the maintenance one provides to whom one financially supports in terms of food, clothing, housing and the like, according to what is reasonable.

Maintaining one's wife, in terms of food (provision), clothing and housing of the same quality as that of other similar women, comes at the top of one's duties toward her. For Allah, Exalted be He, says:

> ***"Let a man of wealth spend from his wealth..."***
>
> (Qur'ân: At-Talâq: 7)

And He also says:

> ***"...And due to them [i.e., the wives] is similar to what is expected of them, according to what is reasonable..."***
>
> (Qur'ân: Al-Baqarah: 228)

Moreover, the Prophet (PBUH) said:

"Their rights upon you are that you should provide them with provision and clothing in a reasonable manner."[1]

(Related by Imâm Muslim and Abû Dâwûd)

Shaykhul-Islâm Ibn Taymiyah (may Allah have mercy on him) said:

*"The Qur'anic verse '...**And due to them [i.e., the wives] is similar to what is expected of them, according to what is reasonable...**' involves all rights of the wife and other rights she is to do. This matter can be judged according to what is commonly acknowledged and repeated among people."*[2]

When there is a dispute between the two spouses, the judge estimates the amount of the wife's alimony according to the financial level of them both, whether they both are rich or only one of them is rich. Thus, a well-off wife who is married to a well-off husband is entitled to have a sufficient amount of provision of the same quality as that of similar women in that town; the same is true for clothing and furniture. Likewise, a poor wife with a poor husband is entitled to have a sufficient amount of food, clothing and furniture of the same quality as that of similar women. However, the wife of the middle class with a similar husband (of the same conditions), a well-off wife with a poor husband, and a poor wife with a well-off husband, are entitled to have the maintenance of the average level, according to the known customs. Moreover, the husband is to provide for what his wife needs such as water for personal cleanliness, drinking and purification, etc. However, the husband is not to provide the aforementioned needs if they are no longer married. Once a wife is divorced and becomes in her waiting period, the following cases are to be observed:

A revocably divorced woman is entitled to be maintained by her husband as long as she is in her waiting period, as she is regarded as a wife. This is because Allah, Exalted be He, says:

"...And their husbands have more right to take them back in this [period]..." (Qur'ân: Al-Baqarah: 228)

A major or minor irrevocably divorced woman is not entitled to any financial support or housing by her husband. This is based on the *hadîth* narrated in the Two Authentic Books of Al-Bukhârî and Muslim that when the husband of Fâtimah Bint Qays (may Allah be pleased with her) irrevocably divorced her, the Prophet (PBUH) said to her:

"There is neither alimony nor lodging for you."[3]

With regard to this, the great scholar **Ibnul-Qayyim** (may Allah have mercy on him) said:

> *"According to the authentic Sunnah (Tradition) of the Messenger of Allah (PBUH) which agrees with the Glorious Qur'ân, an irrevocably divorced woman is not entitled to any alimony or lodging. This also comes in conformity with the analogical deduction and is the view of the scholars of Hadîth as well."*[4]

However, a pregnant irrevocably divorced woman is entitled to alimony, for Allah, Exalted be He, says:

> ***"...And if they should be pregnant, then spend on them until they give birth..."*** (Qur'ân: At-Talâq: 6)

And He, Exalted be He, also says:

> ***"Lodge them [in a section] of where you dwell out of your means..."*** (Qur'ân: At-Talâq: 6)

Moreover, the Prophet (PBUH) said to Fâtimah Bint Qays:

> *"There is no alimony for you except if you are pregnant."*[5]

This is because since the husband is the father of the unborn child, he then is to financially support it and this cannot be achieved except through maintaining the mother. Concerning this view, **Al-Muwaffaq** and other scholars commented saying:

> *"This opinion is unanimously agreed upon by all scholars. However, they entertained different views concerning whether alimony is paid for the fetus itself or for the woman for the sake of the fetus?"*

With this in mind, the issues involved in the aforesaid two opinions are summarized in numerous rulings explained in books of jurisprudence and legal rulings.

A wife is not entitled to maintenance by her husband for several reasons as follows:

When the wife keeps herself away from her husband, then she is not entitled to be maintained by her husband, this is because, in such a case, he does not sexually enjoy her and he is to maintain her in return for enjoying her.

The same is true when a wife shows disobedience to her husband, i.e. disobeys her husband in doing her marital duties, such as refusing to allow him to have sexual intercourse with her, refusing to move in to another suitable

house, or leaving his house without his permission. In such cases, the wife is considered disobedient, as he cannot enjoy her. Thus, she is not entitled to receive her alimony, for, as mentioned before, he is to maintain her in return for enjoying her.

Furthermore, when the wife keeps herself away from her husband by traveling for some purpose, then she has no right to be maintained by her husband, for, in such a case, he cannot enjoy her.

Moreover, a widow is to be provided for by herself or whoever is responsible for her if she is poor. This is because she is not entitled to have the alimony out of her husband's estate, which belongs then to his heirs.

A pregnant widow is entitled to be maintained from the estate of her husband, if he has left any, due to the existence of the fetus; if the deceased husband has left nothing, the well-off among the fetus' legal heirs (in case the fetus dies) is to maintain the mother.

It is permissible that the two spouses agree that the maintenance be afforded in advance or be delayed either for a long or a short time; they have the full right to do so. If they disagree (concerning when to pay the maintenance), the husband is to pay the maintenance at the beginning of the day. It is permissible to pay it in grain, if they agree to do so, but as it requires a great deal of effort, she has the right to accept or refuse the maintenance in grain.

Likewise, the husband is to provide his wife with the annual clothing at the beginning of every year. If the husband is absent and has not left the usual maintenance for his wife or if he is present but has not given the maintenance to her, then he still has to give the previous delayed maintenance, for it is still her right which the husband must give in ease or hardships. This right does not become invalid with the passage of time.

The husband is to start maintaining his wife once she allows him to enjoy her in the marital life. If he is unable to financially support her, it is permissible for her to nullify the marriage contract. This is based on the *hadîth* Abû Hurayrah (may Allah be pleased with him) narrated that the Prophet (PBUH) said concerning a man who cannot financially support his wife:

"They are to be separated (by divorce)."[4]

(Related by Ad-Dâraqutni)

This is also asserted by the following verse as Allah, the Almighty, says,

"...Then [after that], either keep [her] in an acceptable manner or release [her] with good treatment..." (Qur'ân: Al-Baqarah: 229)

Undoubtedly, keeping a wife without financially supporting her is not an acceptable manner.

If a well-off husband is absent without leaving sufficient expenditure to his wife and she cannot take it from his estate or borrow it to his debit, then she has the right to nullify the marriage contract by the permission of the judge. If she is able to take from his estate, she is allowed to take the amount that suffices her. The evidence of this is shown in the *hadith* related in the Two Authentic Books of Al-Bukhârî and Muslim that when Hind Bint `Utbah told the Prophet (PBUH) that her husband (Abû Sufyân) does not give her sufficient money, he (PBUH) said to her:

> *"Take what is sufficient for you and your children, and the amount should be just and reasonable."*

In view of the aforementioned opinions, we realize how perfect the *Sharî`ah* (Islamic Law) is in rendering every right to him who is entitled to it. This is in fact the case in all its wise legislations. Shame on those who replace the Divine *Sharî`ah* with the human laws! Allah, Exalted be He, says concerning such people:

> ***"...Then is it the judgment of [the time of] ignorance they desire? But who is better than Allah in judgment for a people who are certain [in faith]."*** (Qur'ân: Al-Mâ'idah: 50)

Endnotes

1 Muslim (2941) [4/402] and Abû Dâwûd (1905) [2/312].
2 See: '*Majmû`ul-Fatâwâ*' (34/132).
3 Muslim (3682) [5/338].
4 See: '*Zâdul-Ma`âd*' [5/470-471].
5 Abû Dâwûd (2290) [2/496], An-Nasâ'î (3222) [3/370], and Muslim (3688) [5/340].
6 Ad-Dâraqutnî (3742) [3/306].

CHAPTER

5

Maintaining Relatives and Possessions

One's close relatives here refer to those who are entitled to inherit from one either by virtue of the prescribed shares or by being an agnate relative. Possessions refer to those who are under one's possession, slaves or animals.

When one's relatives are descending from the two origins of lineage, i.e., parents and grandparents of the maintainer no matter how high they are in ascending lineage, or children no matter how low they are in a descending lineage, then it is obligatory to maintain them, provided that the following conditions are fulfilled:

- The maintained persons must be poor who possess nothing, or possess insufficient provisions, while being unable to earn their living.
- Moreover, the maintainer must be well-off who possesses abundant provision for himself, his wife and his slaves (if any).

- ❖ The maintainer and the maintained persons must be of the same religion.
- ❖ If the maintained person(s) is not among the maintainer's forefathers or offspring, then it is stipulated, in addition to the above-mentioned conditions, that the maintainer must be entitled to inherit from the maintained one.

One must maintain one's parents according to what Allah, Exalted be He, says:

> ***"...and to parents do good..."*** (Qur'ân: Al-Baqarah: 83)

Needless to say that maintaining one's parents is one of the best ways to do good to them.

The evidence that the father must maintain his children is shown in the noble verse as Allah, the Almighty, says:

> ***"...Upon the father is their [i.e., the mothers'] provision and their clothing according to what is acceptable..."***
> (Qur'ân: Al-Baqarah: 233)

The noble verse states that the father is to provide his wife with provision and clothing in an acceptable manner as followed with similar women in their town, in accordance with the husband's financial conditions with no squandering or niggardliness. With regard to this, the Prophet (PBUH) said:

> *"Take what is sufficient for you and your children, and the amount should be just and reasonable."*

One is to maintain the person one is to inherit by virtue of the prescribed shares or by agnation. The evidence to that is shown in the verse as Allah, Exalted be He, says:

> ***"...And upon the [father's] heir is [a duty] like that [of the father]..."*** (Qur'ân: Al-Baqarah: 233)

This is because the kinship between the inheritor and the inherited person necessitates that the heir is the most entitled person to the inheritor's estate than any one else. Thus, the inherited person is more entitled to be maintained by the inheritor not by those who are not entitled to inherit him (the inherited person).

In consideration of this verse:

> ***"...And upon the [father's] heir is [a duty] like that [of the father]"***
> (Qur'ân: Al-Baqarah: 233)

Allah, Exalted be He, means that the one who is entitled to inherit a child (in case this child dies) is to maintain this child the same way as the child's father would do. Moreover, Allah, the Almighty, says:

"*...And give the relative his right...*" (Qur'ân: Al-Isrâ': 26)

There are many other evidences signifying that the affluent person is to maintain his needy relatives. In this connection, Abû Dâwûd related:

"A man asked the Prophet (PBUH), 'O Messenger of Allah! To whom should I show kindness?' The Prophet (PBUH) said, 'Your mother, your father, your sister and your brother.' "[1]

It is also related by An-Nasâ'î, on the authority of Târiq Al-Muhâribî, and deemed a *sahîh* (authentic) *hadîth* by Al-Hâkim, that the Messenger of Allah (PBUH) said:

"...Start giving first to your dependents: your mother, your father, your sister, your brother, and then your closest relatives according to closeness."[2]

This *hadîth* explains the noble verse that states:

"*...And give the relative his right...*" (Qur'ân: Al-Isrâ': 26)

The father solely is to fully maintain his children, for the Prophet (PBUH) said to Hind Bint `Utbah when she complained of her miserly husband:

"Take what is sufficient for you and your children, and the amount should be just and reasonable."

This noble *hadîth* signifies that the father solely is to maintain his children, a ruling that is asserted by the noble verse:

"...upon the father is their [i.e., the mothers'] provision and their clothing according to what is acceptable..."

(Qur'ân: Al-Baqarah: 233)

And the noble verse:

"...And if they breastfeed for you, then give them their payment..." (Qur'ân: At-Talâq: 6)

This implies that the father is the one who must maintain the breastfeeding baby, not the mother.

As for the poor person who has well-off relatives, excluding his father, they share in maintaining him according to the amount of their shares of inheri-

tance from him. This is because Allah, Exalted be He, has related the maintenance to the inheritance as in the noble verse:

> ***"...And upon the [father's] heir is [a duty] like that [of the father]..."***
> (Qur'ân: Al-Baqarah: 233)

Thus, the amount of maintenance is to be proportional to that of the inherited estate. Hence, whoever has a rich grandmother and a full brother, the former is to undertake one-sixth of his (the inherited person's) maintenance while the rest is to be undertaken by the latter, as they inherit him according to the same shares, and so on.

As for the maintenance of slaves and animals, their master is to maintain his slaves in terms of food, clothing, and housing in an acceptable manner. This is based on the *hadith* in which the Prophet (PBUH) says:

> *"It is essential to feed the slave, clothe him (properly) and not to burden him with work which is beyond his power."*
>
> (Related by Ash-Shâfi'i in his *Musnad* (*Collection of Ascribed Hadiths*))

It is related in the two authentic books of Al-Bukhârî and Muslim that Abû Dharr (may Allah be pleased with him) narrated:

> *"The Prophet (PBUH) said, 'Your slaves are your brothers (in Islam) and Allah has put them under your command. So whoever has a brother under his command should feed him of what he eats and dress him of what he wears. Do not ask them (slaves) to do things beyond their capacities (power).'"*[1]

This is also asserted in the noble verse as Allah, the Almighty, says:

> ***"...We certainly know what We have made the obligatory upon them concerning their wives and those their right hands possess..."*** (Qur'ân: Al-Ahzâb: 50)

These texts signify that the slaves' maintenance is obligatory upon their masters.

If a male slave asks permission for marriage, his master must either get him married or sold, for Allah, Exalted be He, says:

> ***"And marry the unmarried among you and the righteous among your male slaves and female slaves..."*** (Qur'ân: An-Nûr: 32)

The imperative statement in the aforementioned verse implies obligation when requested by the concerned person. Likewise, if the same is asked by a female slave, her master is given a choice as to have sexual intercourse with her, get her married or sell her to relieve her of any harm.

Whoever owns an animal is to feed it, provide it with water, and do what is good for it, for the Prophet (PBUH) says:

> *"A woman was punished because of a cat which she had imprisoned until it died out of hunger. She neither gave it food nor water, nor set it free to eat from the vermin of the earth."*[4]
>
> (Related by Al-Bukhârî and Muslim)

This *hadith* signifies that one is to maintain one's animals, for the said woman was admitted to Hellfire due to leaving the cat unfed or maintained. If this is the case with a cat, then other possessed animals are more entitled to be fed and maintained.

Furthermore, it is impermissible for the owner of an animal to overburden it, or to milk it in a way that harms its offspring. The Prophet (PBUH) says:

> *"One should not harm others nor should one seek benefit for himself by causing harm to others."*

Moreover, it is prohibited for the owner of an animal to curse, hit or brand it on the face. If the animal's owner is unable to maintain it, he is to be forced (by the judge) to have it sold, hired out or slaughtered, if it is lawful to be eaten, as keeping it without maintenance is an act of injustice that must be eliminated. And Allah, Exalted be He, knows best.

Endnotes

1 Abû Dâwûd (5140) [5/221].
2 An-Nasâ'î (2531) [3/65], Al-Hâkim (7327) [4/149], and Abû Dâwûd (5139) [5/220].
3 Al-Bukhârî (2545) [5/214] and Muslim (4291) [6/136].
4 Al-Bukhârî (3482) [6/629] and Muslim (5813) [7/459].

IX: QIṢÂṢ
(LEGAL RETRIBUTION)

CHAPTER

1

Murder and its Types

Faqihs define crime as one's transgression against another's body, property, or honor. They have specified "the Book on Crimes" for the rulings on the first kind, which is transgression against someone's body, and "the Book on Penalties" for the second and the third ones, namely transgression against someone's property and that against someone's honor.

The act of assaulting someone's body is the act that obligates *qiṣâṣ* (legal retribution), *diyah*,[1] or expiation. Muslim scholars unanimously agree on the prohibition of taking a person's life without right. The proof of this prohibition is derived from both the Ever-Glorious Book, the Qur'ân, and the *Sunnah* (Prophetic Tradition). Allah, Exalted be He, says:

> ***"And do not kill the soul [i.e. person] which Allah has forbidden, except by right..."***
>
> (Qur'ân: Al-An`âm: 151)

Moreover, the Prophet (PBUH) says:

> *"The blood of a Muslim who testifies that there is no deity but Allah and that I am His Messenger cannot be shed except in one of three cases: the case of a married person who commits adultery, in qiṣâṣ (legal retribution) for murder, and the one who reverts from Islam (i.e. apostates) and leaves the Muslim community."*[2]
>
> (Related by Muslim and other compilers of *Ḥadîth*)

There are various *ḥadîths* that carry the same meaning of the aforementioned one.

Therefore, whoever takes the life of a Muslim intentionally and without right, Allah, Exalted be He, will punish him severely in the Hereafter, as He says:

> ***"But whoever kills a believer intentionally – his recompense is Hell, wherein he will abide eternally, and Allah has become angry with him and has cursed him and has prepared for him a great punishment."*** (Qur'ân: An-Nisâ': 93)

Such a murderer is regarded as a defiantly disobedient person, as he commits one of the major sins, namely murder. Still, Allah is the One to judge such a person; He will punish him if He wills or forgive him if He wills. Allah, Exalted be He, says:

> ***"Indeed, Allah does not forgive association with Him, but He forgives what is less than that for whom He wills..."***
>
> (Qur'ân: An-Nisâ': 48)

Hence, such a sin, murder, may be forgiven, as it is lesser than associating others in worship with Allah. This is the case when the murderer does not repent, but if he repents, his repentance is accepted, as Allah, Exalted be He, says:

> ***"Say, 'O My servants who have transgressed against themselves [by sinning], do not despair of the mercy of Allah. Indeed, Allah forgives all sins. Indeed, it is He Who is the Forgiving, the Merciful.' "*** (Qur'ân: Az-Zumar: 53)

However, the right of the murdered person is not dropped in the Hereafter by the repentance of the murderer. The right of the murdered person will be taken from the good deeds of his murderer according to the wrong done to him, or Allah will grant the murdered person good deeds out of His bounty, i.e. without taking from the good deeds of the murderer. In addition, the right of the murdered person is not dropped through *qiṣâṣ* (legal retribution), as

such retribution is only the right of the family of the murdered person. In this respect, **Ibnul-Qayyim** (may Allah have mercy on him) said:

> *"There are three rights relating to murder: the first belongs to Allah, the second to the murdered person, and the third to the family of the murdered person. Hence, if the murderer gives himself up to the family of the murdered person, showing regret, fear of Allah, and sincere repentance, Allah's right will be dropped and the right of the family of the murdered person will be dropped when the qiṣâṣ (legal retribution) or reconciliation is applied. As regards the right of the murdered person, Allah will compensate him on the behalf of the repentant murderer on the Day of Resurrection and reconcile between them as well."*[3]

Types of Murder

According to the majority of Muslim scholars, there are three kinds of killing:

- **Premeditated murder**
- **Quasi-premeditated murder**
- **Manslaughter**

As for the premeditated killing and manslaughter, they are stated in the Ever-Glorious Book of the Qur'ân. Allah, Exalted be He, says:

> ***"And never is it for a believer to kill a believer except by mistake. And whoever kills a believer by mistake – then the freeing of a believing slave and a compensation payment [diyah] presented to his [i.e. the deceased's] family [is required] unless they give [up their right as a] charity... But whoever kills a believer intentionally – his recompense is Hell, wherein he will abide eternally, and Allah has become angry with him and has cursed him and has prepared for him a great punishment."*** (Qur'ân: An-Nisâ': 92-93)

Concerning the ruling on quasi-premeditated murder, it is stated in the honorable *Sunnah* of the Prophet (PBUH). For example, 'Amr Ibn Shu'ayb reported on the authority of his father and grandfather respectively that the Prophet (PBUH) said:

> *"The diyah (blood money) for quasi-premeditated murder is to be made as much as that for premeditated murder, but the culprit in the former case is not to be killed. Satan (in quasi-premeditated murder) insinuates people and then blood is shed blindly without any previous malice or weapon."*[4]
> (Related by Ahmad and Abû Dâwûd)

Moreover, `Abdullâh Ibn `Amr (may Allah be pleased with him) narrated that the Messenger of Allah (PBUH) said:

> *"The diyah (blood money) for quasi-premeditated murder, such as that committed with a whip or a stick, is one hundred camels, forty of which are pregnant."*[5]
>
> (Related by the Five Compilers of *Hadîth* except At-Tirmidhî)

Premeditated Murder

It is the type of murder in which one intentionally kills a human being – while being aware that his blood is inviolable – by attacking him with something fatal. This definition involves that the case is not regarded as premeditated murder unless the following conditions are met:

1) Having the intention of killing
2) Being previously aware of the inviolability of the victim's blood as a human being
3) The weapon or the tool used is a fatal one, whether it is specified for killing or not.

Therefore, if one of these conditions is not present, the case will not be regarded as premeditated murder. This is because the absence of intention does not obligate *qisâs* (legal retribution), and the occurrence of death with something that is not supposed to be fatal indicates that death may have been due to something else as scholars agreed.

According to induction, there are nine forms of premeditated murder:

1- The murderer wounds a person with something sharp and body-penetrating, such as a knife, a spike, or the like. In this regard, **Al-Muwaffaq** said, *"As far as we know, there is no juristic disagreement among scholars on this ruling (i.e. killing using such tools is deemed premeditated murder)."*

2- The murderer kills a person with something heavy, such as a stone and the like. Therefore, if the stone, for example, is small, the case will not be regarded as premeditated murder, unless it is intentionally aimed at a vital spot of the body. Similarly, it will be regarded as premeditated murder if such a small stone (that usually does not cause death) is used while the victim is in a state of weakness, illness, youngness, oldness,

coldness, hotness, and the like. The same applies when the murderer repeats the action of beating the victim with such a small stone or the like until he dies. This is also similar to the cases when a person kills another by letting a wall fall on him, hitting him with a car, or throwing him from a high place.

3- The murderer throws a person to a deadly animal, such as a lion or a serpent. Thus, if one intentionally throws another to such deadly creatures, the case is deemed premeditated murder, for such creatures are generally known to be killers.

4- The murderer throws a person into fire or deep water, which may cause him to drown, while the victim cannot escape from them.

5- The murderer strangles a person with a rope or the like or stifles him to death.

6- The murderer imprisons the victim and deprives him of food and drink until he dies, being imprisoned for a period in which anyone is supposed to die out of hunger and thirst if they do not find food or water. Such a case is considered premeditated murder.

7- The murderer, knowingly, uses sorcery or black magic that often causes death to the victim.

8- The murderer knowingly makes the victim drink poison or cunningly mixes it with the victim's food while the latter is unaware.

9- Some witnesses falsely testify against someone causing the latter to be sentenced to death, as in cases like adultery, apostasy, or premeditated murder, whose penalty in Islam is capital punishment. Such witnesses are regarded as murderers, as they intentionally kill an innocent person. So, if they renege on their testimony or if their plot is disclosed, they are to be sentenced to death as well.

Quasi-premeditated Murder

According to *faqihs*, quasi-premeditated murder occurs when someone kills another with the intention of causing him harm or injury, not death. Such a case is regarded as quasi-premeditated murder whether the murderer's purpose is aggression or mere disciplinary punishment, as the offender exceeds the limits in doing so until it results in death. It is called "quasi-premeditated murder" as the perpetrator just intends harm or injury, but he unintentionally kills the victim. In this connection, **Ibn Rushd** said:

"As for the one who intends harm to another person and strikes him with something generally nonfatal, the ruling wavers between intentional and unintentional killing. It is similar to premeditated murder as the perpetrator intentionally beats the victim, and it is similar to manslaughter as he beats him with something that is generally not intended to cause death."[6]

Among the examples of quasi-premeditated murder is the case in which one strikes a person in a non-vital bodily spot with a whip or small stick. Another example is the case when one punches another with the hand in a non-vital spot but it results in the latter's death. Such cases are regarded as quasi-premeditated murder that obligates expiation taken from the perpetrator's money. The expiation for quasi-premeditated murder is emancipating a slave; if the perpetrator does not have a slave or cannot afford to buy one to emancipate, he must perform fasting for two consecutive months, just like the case of manslaughter. In addition, binding *diyah* (blood money) is to be paid by the murderer's agnate relatives. To illustrate, Abû Hurayrah (may Allah be pleased with him) narrated:

"Two women from (the tribe of) Hudhayl fought with each other and one of them hit the other with a stone that killed both her and the fetus she carries. The killer's agnate relatives and those of the victim submitted their case to the Prophet (PBUH) who judged that the diyah for the murdered woman was to be paid by the murderer's agnate relatives."[7]

(Related by Al-Bukhârî and Muslim)

Hence, the aforementioned *ḥadîth* shows that *qiṣâṣ* (legal retribution) is not obligatory in the case of quasi-premeditated murder. It also indicates that the *diyah* is to be paid from the wealth of the murderer's agnate relatives. Since it is considered a murder that does not obligate *qiṣâṣ*, the *diyah* is to be paid by the murderer's relatives just like the case of manslaughter. In this regard, **Ibnul-Mundhir** said, *"All Muslim scholars unanimously agree that the diyah (for quasi-premeditated murder) is to be paid by the murderer's agnate relatives."*[8] In addition, **Al-Muwaffaq** said, *"We know no juristic disagreement on the ruling that the diyah (for quasi-premeditated murder) is to be paid by the murderer's agnate relatives."*[9] The same opinion was adopted by other scholars as well.

Manslaughter

According to *faqihs* (may Allah have mercy on them), manslaughter occurs when someone kills an inviolable human being by mistake while doing something permissible for him to do, such as shooting or hunting. The same applies when a Muslim kills a fellow Muslim in a battle, thinking he is one of the disbelievers.

The ruling on the intentional murder committed by a child or an insane person is the same as that on manslaughter. This is because the condition of intention is lacking in case of such persons (due to their lack of mental maturity or soundness). Thus, the premeditated murder of a minor or an insane is regarded as the manslaughter of a legally accountable person.

Likewise, the ruling on killing due to being a causative factor is the same as that of manslaughter. For example, when one digs a well or a hole on a road or a street and another falls therein and dies, or when one stops a car on the road or a street and one crashes against it and dies, the ruling in such cases is the same as that of manslaughter.

The expiation for manslaughter is obligatory to be taken from the wealth of the murderer; the expiation for it is the emancipation of a believing slave, and if one does not have one or cannot afford to buy one to emancipate, then he should perform fasting for two consecutive months instead. Moreover, the *diyah* for manslaughter is obligatory to be paid by the perpetrator's male agnate relatives.

Furthermore, if a Muslim kills a Muslim mistakenly in a war believing that he is one of the disbelievers, there will be nothing obligatory on him except for the expiation. Allah, Exalted be He, says:

> ***"... And whoever kills a believer by mistake – then the freeing of a believing slave and a compensation payment [diyah] presented to his [i.e. the deceased's] family [is required] unless they give [up their right as a] charity. But if he [i.e. the deceased] was from a people at war with you and he was a believer – then [only] the freeing of a believing slave; and if he was from a people with whom you have a treaty – then a compensation payment presented to his family and the freeing of a believing slave. And whoever does not find [one or cannot afford to buy one] - then [instead], a fast for two months consecutively, [seeking] acceptance of repentance from Allah. And Allah is ever Knowing and Wise"***
>
> (Qur'ān: An-Nisā': 92)

Hence, Allah, Exalted be He, stated two kinds of manslaughter:

First: the first kind of manslaughter is that in which the expiation is obligatory on the murderer and the *diyah* on his agnate relatives. This kind involves killing a believer unintentionally without mistaking him for a disbeliever in the battlefield. The same ruling applies to the case of unintentional killing of one of those with whom Muslims have a peace treaty.

Second: the second kind of manslaughter is that in which only the *diyah* is obligatory. This kind involves killing a believer unintentionally in the battlefield, mistaking him for one of the disbelieving enemies.

In his book entitled *Fat͟hul-Qadîr* (*The Bestowal of the Omnipotent*),[1] **Imâm Ash-Shawkâni** (may Allah have mercy on him) said:

> *"Allah, Exalted be He, says, '...**But if he [i.e. the deceased] was from a people at war with you and he was a believer then [only] the freeing of a believing slave...**'* (Qur'ân: An-Nisâ': 92) *The verse indicates that in case of killing a believer whose people are in a state of war against Muslims, such as killing a believer in a disbelieving country to which he belonged, thinking he was still a disbeliever, there is no diyah to be paid by his murderer. Yet, it is obligatory for him (i.e. the murderer) to emancipate a believing slave in expiation. Muslim scholars differ concerning the principle on which there is no diyah obligatory in case of killing a believer mistaking him for a disbelieving enemy. Some scholars say that the people of the killed person are disbelievers, so they are not entitled to claim his diyah. Others maintain that the blood sanctity and inviolability of the one who has converted to Islam but has not yet moved from his disbelieving country is still insufficient. This is because Allah, Exalted be He, says, '...**But those who believed and did not emigrate – for you there is no guardianship of them...**'* (Qur'ân: Al-Anfâl: 72) *Yet, some other scholars view that the diyah is obligatory in this case, and that it is to be paid to the Muslims' Public Treasury."*

In this respect, **Shaykhul-Islâm Ibn Taymiyah** (may Allah have mercy on him) said:

> *"The diyah is due in case of mistakenly killing a Muslim whose people are disbelievers, provided he is among them due to a legal excuse, such as being a captive or one who is unable to emigrate. Contrarily, there is by no means diyah for mistakenly killing a Muslim who willingly*

chooses to remain among his disbelieving people who are enemies of the Muslims, as he thus exposes himself to danger without a legal excuse."

The proof of the fact that it is obligatory for the perpetrator's agnate relatives to pay the *diyah* in case of manslaughter is derived from the following *hadîth* narrated by Abû Hurayrah (may Allah be pleased with him). He narrated:

"The Messenger of Allah (PBUH) gave the judgment that a male or female slave is to be given (as diyah) in compensation for an abortion of a woman from (the tribe of) Banû Lahyân. Then the woman on whom the compensation had been imposed died, so the Messenger of Allah (PBUH) ordered that her offspring and her husband are to inherit her property and that her agnate relatives are to pay the diyah (blood money)."[11]

(Related by Al-Bukhârî and Muslim)

So, the *hadîth* states that the *diyah* for manslaughter is to be paid by the perpetrator's agnate relatives; an opinion on which there is consensus among scholars.

Perhaps the wisdom behind this opinion is that if the *diyah* for manslaughter is to be paid by the perpetrator, there will be a great financial harm caused to him for a sin he has unintentionally committed, as such accidents happen recurrently. Thus, if the committer is to shoulder the consequences alone, i.e. paying the *diyah*, it will be regarded as doing him financial injustice. On the other hand, there must be a kind of compensation for the murdered person, as he is considered an inviolable soul, whose killing causes harm to his heirs, especially his family. Hence, the Wise Lawgiver[12] obliges those who stand beside and support the perpetrator to help him in such a matter (i.e. in paying the *diyah*), just like the obligation of providing for their needy relatives or freeing their captivated relatives. Since one's agnate relatives generally inherit from one when one dies, they have to compensate on one's behalf when one commits manslaughter due to the general principle stating, **"Sharing in affliction in return for getting benefit."**

However, the expiation is obligatory on the perpetrator of manslaughter for the following reasons:

1. Such expiation is a means of showing respect to the inviolable murdered soul.
2. Manslaughter is by no means void of the perpetrator's heedlessness.

3. Such expiation does not allow the perpetrator to be completely free from paying for his guilt; since the *diyah* is not obligatory upon him (as it is paid by his agnate relatives), he must expiate for his offense.

That is to say, there are several wisdoms and benefits behind obligating the payment of *diyah* upon the perpetrator's agnate relatives and the expiation for the manslaughter upon the perpetrator himself. Glory be to Allah, the Wise and the Knowing, Who has ordained for people what benefits them in both their religious and worldly lives.

It is important to point out that slaves, poor people, minors, insane people, females, and those of religions different from that of the perpetrator, are not considered among the perpetrator's agnate relatives (who are obliged to pay the *diyah*), as they are not among those who are supposed to be his supporters and backers.

In this connection, the agnate relatives of the perpetrator of manslaughter are allowed to defer the payment of the *diyah* for three years. Moreover, the magistrate (or the one in authority) should resort to *ijtihâd* to specify a certain share of the *diyah* for each of them to pay according to their financial states. In doing so, he is to begin with the closest relatives, then the closer, and so on and so forth. Yet, **Shaykhul-Islâm Ibn Taymiyah** (may Allah have mercy on him) said:

> *"The diyah is not to be delayed if the ruler perceives a benefit in instant payment..."*[13]

Endnotes

1 *Diyah* in Arabic means a compensation payment for a murder or an injury; it mainly means "blood money", and it can also mean "indemnity".

2 Al-Bukhârî (6878) [12/250] and Muslim (4351) [6/166].

3 See the footnote in *Ar-Rawḏ Al-Murbi'* [7/165].

4 Aḫmad (6718) [2/183] and Abû Dâwûd (4565) [4/451].

5 Aḫmad (4583) [2/11], Abû Dâwûd (4547) [4/443], An-Nasâ'î (4805) [4/409], and Ibn Mâjah (2627) [3/267].

6 See: "*Bidâyat Al-Mujtahid*" [2/486].

7 Al-Bukhârî (6910) [12/314] and Muslim (4367) [6/177].

8 See: *Al-Ijmā'* [p. 172].
9 See: "*Al-Mughnī*" [12/16].
10 See: "*Fathul-Qadīr* (*The Bestowal of the Omnipotent*)" (1/792).
11 Al-Bukhārī (6740) [12/30] and Muslim (4366) [6/176].
12 The Lawgiver of *Sharī'ah* (Islamic Law) is Allah, Exalted be He; the term can also refer to the Prophet (PBUH) as he never ordained but what was revealed to him by Allah.
13 See the footnote in *Ar-Rawd Al-Murbi'* (7/287).

CHAPTER

2

Qisâs for Murder

Muslim scholars unanimously agree on the legality of *qisâs* (legal retribution) for murder in the case of premeditated murder provided the conditions of such a murder are met. This is because Allah, Exalted be He, says:

> ***"O you who have believed, prescribed for you is legal retribution for those murdered – the free for the free, the slave for the slave, and the female for the female..."*** (Qur'ân: Al-Baqarah: 178)

Allah, Exalted be He, also says:

> ***"And We ordained for them therein a life for a life..."***
> (Qur'ân: Al-Mâ'idah: 45)

This is also stated in the Law of the Torah, and we are to abide by the laws of the previous heavenly revealed religions as long as they are not abrogated by our *Shari'ah* (Islamic Law). In addition, Allah, Exalted be He, says:

"And there is for you in legal retribution [saving of] life, O you [people] of understanding, that you may become righteous."

(Qur'ân: Al-Baqarah: 179)

Imâm Ash-Shawkânî (may Allah have mercy on him) commented on the aforementioned verse saying:

"There is saving of life in this ruling ordained by Allah, as when one bears in mind that there is qiṣâṣ (legal retribution) if he kills another, he will abstain from killing, avoid it, and restrain himself from committing it. Thus, qiṣâṣ (legal retribution) is considered a means of saving human lives. This verse is a great example of eloquence, as Allah made the qiṣâṣ for murder, which is death, a means of preserving human lives. This is because such a ruling deters people from killing one another to preserve and maintain their own lives. In this verse, Allah addresses the 'people of understanding', as they are the ones who consider the consequences of their actions and avoid that which may cause anticipated harm. However, those characterized by heedlessness and lightheadedness do not, at their times of rage, consider or listen to the voice of reason regarding the bad consequences that may result from their actions. Some of those murderous persons said:

"I will clear my disgrace with my sword

And let Allah ordain for me whatever He may ordain"

Then, Allah, Exalted be He, shows the reason behind ordaining retribution (qiṣâṣ) in case of murder saying, ***'...that you may become righteous.'*** (Qur'ân: Al-Baqarah: 21) *That is to say, avoiding killing because of the qiṣâṣ becomes a means leading to righteousness."*[1]

In this connection, the *Sunnah* (Prophetic Tradition) states that the heir or legal representative of the murdered person would choose one of three choices: to seek *qiṣâṣ*, to pardon the murderer in return for the *diyah*, or to pardon him and give it (i.e. the *diyah*) up, which is considered the best thing to do. Abû Hurayrah (may Allah be pleased with him) narrated that the Prophet (PBUH) said:

"Whoever suffers the murder of a relative, he has the choice between two options: either he may receive the payment of diyah (blood money) or he may choose qiṣâṣ (legal retribution)."[2]

(Related by the Group of Compilers of *Ḥadîth*)

Moreover, Allah, Exalted be He, says:

> ***"...But whoever overlooks from his brother [i.e. the killer] anything, then there should be a suitable follow-up and payment to him [i.e. the deceased's heir or legal representative] with good conduct..."***
>
> (Qur'ân: Al-Baqarah: 178)

Thus, both the verse and the *hadith* mentioned above indicate that the relative or the legal representative of the deceased has the right to choose between carrying out the *qisâs* and receiving the *diyah*. Yet, pardoning the murderer and giving up the *diyah* is considered the best thing to be done by the deceased's heir or legal representative. Allah, Exalted be He, says:

> ***"...And to forego it is nearer to righteousness..."***
>
> (Qur'ân: Al-Baqarah: 237)

This is also supported by the *hadith* narrated by Abû Hurayrah (may Allah be pleased with him) in which the Prophet (PBUH) says:

> *"No person forgives an act of injustice (done to him) but Allah will add to his honor for it."*[3]
>
> (Related by Ahmad, Muslim, and At-Tirmidhi)

Moreover, forgoing the *qisâs* (legal retribution) is the best thing to do as long as it does not cause evil or any kind of corruption. **Shaykhul-Islâm Ibn Taymiyah** (may Allah have mercy on him) maintained, *"Pardoning is not to be applied in the case of assassination, as such a kind of murder cannot be guarded against, such as the case of killing in banditry."*[4] Moreover, Al-Qâdî views that the *qisâs* is to be applied on the killer of Imâms (Muslim rulers), as it is an act of general corruption. The great Muslim scholar **Ibnul-Qayyim** commented on the story of the men of 'Uraynah[5] saying:

> *"Killing through assassination obligates applying the qisâs on the killer. Such a legal penalty is not be dropped by pardoning the killer, and no compensation can be accepted as a substitute. This is the opinion adopted by the scholars of Medina, and it is one of the two opinions attributed to Ahmad. In addition, it is the opinion maintained by Shaykhul-Islâm Ibn Taymiyah (may Allah have mercy on him) and he gave a fatwa according to it."*[6]

The heirs or the legal representatives of the killed person do not have the right of *qiṣâṣ* (legal retribution) unless the following four conditions are met:

1- The murdered person must be one of those whose blood is inviolable, as *qiṣâṣ* was ordained to save human lives. Thus, if a Muslim kills a disbeliever whose people are in a state of war with Muslims, or if he kills an apostate before the latter declares his repentance or an adulterer, there will be neither *qiṣâṣ* nor *diyah* due on the part of the perpetrator. Yet, he is to undergo discretionary punishment for arrogating to himself the ruler's authority.

2- The murderer must be mature and sane, for *qiṣâṣ* is a severe punishment that is not permissible to be applied to a minor or an insane whose case is lacking the condition of intention and premeditation, or their intentions, if any, are deemed void. This is based on the *ḥadîth* of the Prophet (PBUH) in which he said:

   "There are three (persons) whose actions are not recorded: a sleeper until he awakes, a minor until he reaches puberty, and a lunatic until he comes to reason."[7]

   Imâm Muwaffaqud-Dîn Ibn Qudâmah said:

   "There is no disagreement among Muslim scholars that there is no qiṣâṣ to be exacted against a minor or an insane; the same applies to anyone in a state of unconsciousness due to an excusable reason, such as being asleep or losing consciousness."[8]

3- There must be equivalence between the murdered person and the murderer when the action of killing has taken place. In other words, they must be equal in religion, and freedom or slavery. That is, the murderer should not be superior to the murdered person due to being a Muslim or being a free person while the murdered is a disbeliever or slave. Accordingly, a Muslim is not to be sentenced to death in *qiṣâṣ* for killing a disbeliever. To illustrate, the Prophet (PBUH) said:

   "No Muslim should be killed in qiṣâṣ (legal retribution) for killing a disbeliever."[9]

   (Related by Al-Bukhârî and Abû Dâwûd)

Moreover, a free person is not to be killed in *qisâs* for killing a slave, as Imâm Ahmad related that `Alî Ibn Abû Tâlib (may Allah be pleased with him) said:

"It is an act of the Sunnah that no free person is to be killed in qisâs for killing a slave."

This is because if the murdered person is not equal to the murderer with regard to the aforementioned aspects, carrying out the *qisâs* on the latter will be more than what the murdered person is entitled to.

No preference is to be taken into consideration between the murdered person and the murderer in matters other than those mentioned above. So, a handsome person is not preferred to an ugly one; if the former kills the latter, the *qisâs* is to be applied. The same ruling applies when an honorable man kills a mean one, an adult kills a minor, a male kills a female, or a sane person kills an insane one. This is due to the generality of the Qur'anic verse in which Allah, Exalted be He, says:

"And We ordained for them therein a life for a life..."

(Qur'ân: Al-Mâ'idah: 45)

Allah, Exalted be He, also says:

"...the free for the free..." (Qur'ân: Al-Baqarah: 178)

4- The murdered person must not be one of the murderer's children or descendants. That is to say, none of the parents is to be killed in *qisâs* for killing his/her son, daughter, or any of his/her descendants. This is because the Prophet (PBUH) said:

"A parent is not to be killed (in qisâs) for his/her child."[10]

Commenting on the aforementioned *hadîth*, **Ibn `Abdul-Barr** said, *"This hadîth is well-known among the scholars of Hejaz and Iraq..."* This *hadîth* and the other *hadîths* that carry the same meaning are of the general rule stating the obligation of *qisâs* for murder; this is the opinion adopted by the majority of Muslim scholars.

However, the son is to be killed in *qisâs* when killing any of his parents, due to the generality of the Qur'anic verse in which Allah, Exalted be He, says:

"...prescribed for you is legal retribution for those murdered..."

(Qur'ân: Al-Baqarah: 178)

Yet, the case when a parent kills any of his/her children is an exception of the aforesaid general ruling according to the legal proofs.

Hence, if the aforementioned four conditions are met, the relatives or the legal representatives of the murdered person will have the right of *qiṣâṣ*.

In fact, Allah's ordainment of *qiṣâṣ* involves a divine mercy on people as well as a means of saving human lives, as Allah, Exalted be He, says:

"And there is for you in legal retribution [saving of] life..."
(Qur'ân: Al-Baqarah: 179)

So woe to those who claim that the obligation of *qiṣâṣ* involves brutality and mercilessness. Such people do not consider the cruelty of the offender when he kills an innocent person, spreads panic in the country, widows women, orphans children, and ruins houses. Such people show mercy toward the murderer rather than the innocent, so woe to their narrow-mindedness and unenlightenment. In this regard, Allah, Exalted be He, says:

"Then is it the judgment of [the time of] ignorance they desire? But who is better than Allah in judgment for a people who are certain [in faith]." (Qur'ân: Al-Mâ'idah: 50)

The *qiṣâṣ* is a retaliatory punishment exacted by the victim or his/her heir or legal representative against the offender, returning like for like or evil for evil. The wisdom behind *qiṣâṣ* is that it quenches the flames of wrath and ire of the victim or his/her people. Allah, Exalted be He, ordained *qiṣâṣ* as a means of restraining aggression, extinguishing the flames of wrath in the hearts, letting the murderer taste what he has done to his victim, and saving and preserving human lives.

In this connection, the people of the Pre-Islamic Period of Ignorance (the *Jâhiliyyah*) used to exaggerate in retaliation, killing other innocent people, in addition to the murderer, in revenge. This is undoubtedly a kind of aggression and enflaming of the passions that does not fulfill the purpose of fair retribution. Rather, it is considered a means of more dissention and bloodshed. This is why Islam and its perfect *Sharî'ah* (Islamic Law) ordain *qiṣâṣ* through which fair retaliation is executed only against the perpetrator, not against any innocent people; thus justice, mercy, and prevention of bloodshed are achieved.

We have previously mentioned the conditions obligating *qiṣâṣ*. However, if such conditions are met and thus the *qiṣâṣ* is obligated, it is not to be carried out unless some other conditions are fulfilled. Those conditions have been stated

by *faqîhs* (may Allah have mercy on them), who call them, "the conditions for the fulfillment of *qiṣâṣ*." They are three conditions:

1- The one who has the right to carry out the *qiṣâṣ* in retaliation is to be a legally accountable person. That is, one in this case must be adult and sane. Therefore, if the one (or one of those) entitled to carry out the *qiṣâṣ* is a minor or an insane person, one's guardian is not to carry it out on one's behalf. This is because the *qiṣâṣ* involves vengeance to quench one's thirst of one's wrath, so its purpose will not be attained if it is taken by others on one's behalf. Therefore, the fulfillment of the *qiṣâṣ* must be postponed in such a case, and the offender is to be jailed until the one who has the right of *qiṣâṣ* reaches puberty if he/she is a minor or regains sanity if he/she is an insane person. This is because Mu'âwiyah (may Allah be pleased with him) jailed Hudbah Ibn Khashram in a case entailing *qiṣâṣ* until the son of the murdered person reached puberty, and none of the Prophet's Companions who lived at that time denied that ruling. Hence, it was considered a unanimous agreement by the Companions contemporary to Mu'âwiyah (may Allah be pleased with him) on that ruling. In such a case, if the minor or the insane person who is entitled to carry out the *qiṣâṣ* needs money for expenditure, only the guardian of the insane person has the right to forgo the *qiṣâṣ* and accept the *diyah* instead. This is because no one knows when sanity is regained, unlike the minor who will grow up and reach puberty anyway.

2- There must be an agreement among the legal representatives of the murdered person if the *qiṣâṣ* is to be carried out. Therefore, it is not permissible for some of them to carry it out single-handedly without the consent of the others. This is because, fulfilling the *qiṣâṣ* is considered a shared undividable right, so if some of them fulfill it on their own initiative, they thus transgress the right of the other representatives without their permission and without being their legal guardian.

   In this regard, if any of those having the right of *qiṣâṣ* is absent, a minor, or insane, the fulfillment of *qiṣâṣ* is to be delayed until the absent returns, the minor reaches puberty, and the insane regains sanity. Moreover, if any of those entitled to carry out the *qiṣâṣ* dies, his heirs are to act in this regard on his behalf. In addition, if some of those entitled to carry out the *qiṣâṣ* agree to forgo it, then the *qiṣâṣ* is no longer applicable.

The people entitled to carry out the *qiṣâṣ* are all the heirs of the deceased, men or women and children or adults, whether through blood or marital ties. However, some scholars maintain that the right of fulfilling or forgoing the *qiṣâṣ* is restricted to the deceased's agnate relatives. The latter is the opinion adopted by Imâm Mâlik and one of the opinions reported to be adopted by Imâm Aḥmad. It is also the opinion maintained by Shaykhul-Islâm Ibn Taymiyah (may Allah have mercy on him).

3- Executing the *qiṣâṣ* should never reach persons other than the offender, for Allah, Exalted be He, says:

"...And whoever is killed unjustly – We have given his heir authority, but let him not exceed limits in [the matter of] taking life. Indeed, he has been supported [by the law]." (Qur'ân: Al-Isrâ': 33)

Therefore, if the action of carrying out the *qiṣâṣ* exceeds the limits, it is considered excessiveness, which is forbidden according to the aforementioned noble Qur'anic verse. Accordingly, if the *qiṣâṣ* is to be applied to a pregnant woman or a woman who conceived after being liable for the *qiṣâṣ*, she is not to be killed in *qiṣâṣ* until she gives birth to her baby. This is because killing such a pregnant woman causes the death of the fetus despite its innocence; Allah, Exalted be He, says:

"...And no bearer of burdens will bear the burden of another..."

(Qur'ân: Al-An`âm: 164)

Hence, the pregnant murderer is not to be killed in retaliation unless she gives birth to her baby. Furthermore, after she gives birth to the baby, if there is another woman to breastfeed and take care of the infant, the *qiṣâṣ* can be applied to the mother, as there will be no barrier preventing the execution of the *qiṣâṣ* then. Otherwise, carrying out the *qiṣâṣ* is to be delayed for two years, until the mother weans her infant. This is because the Prophet (PBUH) says:

"If a pregnant woman intentionally murders someone, she is not to be killed (in qiṣâṣ) until she gives birth and cares for her baby. And if a woman commits adultery (and becomes pregnant), she is not to be killed (as legal punishment) until she gives birth and cares for her baby."[1]

(Related by Ibn Mâjah)

Moreover, the Prophet (PBUH) said addressing the woman who confessed committing adultery:

> *"Go home until you give birth."* Later, when she gave birth to the baby and came back to the Prophet (PBUH), he said to her, *"Go home until you wean him."*[12]
>
> Thus, the two *hadiths*, as well as the Qur'anic verse mentioned above, indicate the obligation of delaying the *qisâs* for murder if the perpetrator is pregnant, and this is unanimously agreed upon by Muslim scholars. Such obligation is a proof of the perfection and justice of *Sharî'ah*, as it maintains the fetuses in their mothers' wombs, and prohibits causing them any harm. Moreover, *Sharî'ah* observes the rights of children as well as the weak, protecting them against any harm and providing them with what preserves their lives. So, all praise be to Allah for endowing us with such a lenient, perfect, comprehensive *Sharî'ah* that encompasses all people's interests.

Executing the *qisâs* for murder has to be in the presence and under the supervision of the ruler (or his representative or the one in authority), to avoid injustice and ensure the legality of execution. Moreover, the tool used for executing the *qisâs* for murder must be quite sharp, such as a sword or a knife, for the Prophet (PBUH) says:

> *"When you kill (in qisâs), do it in a good manner (i.e. gently and mercifully)."*[13]

Thus, it is prohibited to execute the *qisâs* using a blunt tool, as this is considered excessiveness in killing.

If the person entitled to execute the *qisâs* is able to perform it in the prescribed legal manner, he is allowed to do it. If not, he is to be ordered by the ruler (or the one in authority) to appoint another person to perform it on his behalf.

As for retaliation, the most preponderant opinion among scholars is that the offender is to be punished in a way equal to the harm he caused to the victim. This is because Allah, Exalted be He, says:

> ***"And if you punish [an enemy, O believers], punish with an equivalent of that with which you were harmed..."***
>
> (Qur'ân: An-Nahl: 126)

Allah, Exalted be He, also says:

> ***"...So whoever has assaulted you, then assault him in the same way that he has assaulted you..."*** (Qur'ân: Al-Baqarah: 194)

In addition, the Prophet (PBUH) ordered that the head of a Jew should be crushed between two stones in retaliation for crushing the head of a girl of the *Anṣâr* (the Supporters)[14].

Imâm Ibnul-Qayyim (may Allah have mercy on him) said:

> *"The Qur'ân and the principles of justice agree that the offender, before being killed in retribution, is to be retaliated against in the same way he did to the victim before murdering him. That was applied by the Prophet (PBUH), and it is proved through the Qur'ân, Sunnah (Prophetic Tradition), and the traditions of Companions..."*[15]

Hence, if the perpetrator has cut off the hand of the victim and then killed him, he is to be punished in the same way he acted, i.e. his hand is to be cut off and then he is to be killed in retribution. Similarly, if the perpetrator has killed the victim with a stone, or has drowned him, or anything of the kind, he is to be punished in the same way before killing him. Still, the deceased's heir or legal representative, who is entitled to carry out the *qiṣâṣ*, has the right to forgo such retaliation for injuries and make the *qiṣâṣ* restricted to cutting off the head of the offender with a sword, and this is more favorable. In this respect, if the offender has killed the victim with an unlawful means, he is to be killed with a sword in *qiṣâṣ*. Nowadays, the act of killing with a sword in *qiṣâṣ* can be replaced with killing by shooting, provided it is performed by someone who shoots accurately.

Endnotes

1 See: "*Fatḥul-Qadîr* (*The Bestowal of the Omnipotent*)" (1/179).

2 Al-Bukhâri (2434) [5/108], Muslim (3292) [5/132], Abû Dâwûd (4505) [4/420], At-Tirmidhi (1409) [4/21], An-Nasâ'i (4799) [4/407], and Ibn Mâjah (3624) [3/265].

3 Muslim (6535) [8/357] and At-Tirmidhi (2034) [4/376].

4 See: "*Al-Ikhtiyarât Al-Fiqhiyyah*" [p. 422].

5 Some people from the tribe of 'Uraynah came to Medina and committed theft and murder after embracing Islam. The Prophet (PBUH) ordered that their hands and feet were to be cut (and it was done); then their eyes were branded with heated pieces of iron and they were left without water until they died.

6 See the footnote of "*Ar-Rawḏ Al-Murbi'*" [7/207].

7 Abû Dâwûd (4403) and An-Nasâ'i (3462).

8 See: "*Al-Mughni*" [9/357].

9 Al-Bukhârî (111), Abû Dâwûd (4530) [4/433], At-Tirmidhî (1416) [4/24], An-Nasâ'î (4758) [4/392], and Ibn Mâjah (2658) [3/282].
10 At-Tirmidhî (1405) [4/19], Ibn Mâjah (2661) [3/283].
11 Ibn Mâjah (2694) [3/300].
12 Abû Dâwûd (4442) [4/381] and Muslim (4406) [6/198].
13 Muslim (5028) [7/107].
14 Al-Bukhârî (6877) [12/649] and Muslim (4337) [6/159].
15 See: "*I'lâm Al-Mwaqi'in*" [1/301—302].

CHAPTER

3

Qiṣâṣ for Parts of the Body and Wounds

The *qiṣâṣ* for parts of the body and wounds is stated according to the Qur'ân, the *Sunnah*, and the consensus of Muslim scholars. Allah, Exalted be He, says:

> ***"And We ordained for them therein a life for a life, an eye for an eye, a nose for a nose, an ear for an ear, a tooth for a tooth, and for wounds is legal retribution..."*** (Qur'ân: Al-Mâ'idah: 45)

Moreover, it is recorded in the Two Authentic Books (of Al-Bukhâri and Muslim) that when Ar-Rubayyi' broke a girl's incisor, the Prophet (PBUH) said:

> *"(The law prescribed in) the Book of Allah is qiṣâṣ."*[1]

Thus, the ruling applying to the killing of a human soul is to be applied regarding parts of the body and wounds, provided that the aforementioned conditions for the validity of the *qiṣâṣ* are met. Such conditions involve that

the victim's blood must be inviolable, the offender must be mature and sane, both the offender and the victim must be equal as regards slavery or freedom, and the offender is not to be one of the victim's parents. On the other hand, the ruling inapplicable in the case of killing is inapplicable in the case of injuries of parts of the body and wounds; this is the general rule in this connection.

Likewise, the condition that obligates the *qiṣâṣ* for parts of the body and wounds is the same as that which obligates it for killing, namely premeditation. Accordingly, there is no *qiṣâṣ* in cases of injuries done by mistake or quasi-intentional ones. With regard to *qiṣâṣ* for parts of the body, an eye is to be taken in retaliation for an eye, a nose for a nose, an ear for an ear, a hand for a hand, a foot for a foot, etc.; the right organ for the right organ and the left for the left. By the same token, a tooth of the offender is to be broken in retaliation for a similar tooth of the victim, an upper eyelid for an upper eyelid, a lower eyelid for a lower eyelid, an upper lip for an upper lip, and a lower lip for a lower lip. This is because Allah, Exalted be He, says:

"...and for wounds is legal retribution..."

(Qur'ân: Al-Mâ'idah: 45)

This is because eyelids and lips have upper and lower parts which should be considered in order to make the *qiṣâṣ* carried out accurately. In addition, the same finger of the perpetrator is to be taken in retaliation for that of the victim, and a right hand for a right hand, a left hand for a left hand, a right elbow for a right elbow, and so on and so forth, as such parts of the body can be accurately distinguished. Likewise, a penis is to be taken in retaliation for a penis, as a penis has a specific end, so the *qiṣâṣ* can be accurately exacted, without transgression. This is indicated in the general meaning of the Qur'anic verse that states:

"...and for wounds is legal retribution..."

(Qur'ân: Al-Mâ'idah: 45)

There are three conditions for the validity of the *qiṣâṣ* for parts of the body:

First: There must be assurance that there will be neither injustice nor transgression. That is, cutting off the part of the body in retaliation must be from a specific joint or to a certain point. Thus, if there is no specific limit, retaliation will be impermissible. In other words, there is no retribution applicable for an unlimited wound, such as a deep flesh-cutting wound that reaches one's abdomen, as there is no specific depth that can be pointed out. Similarly, there is no retribution

applicable for fractures (not teeth breaking) such as breaking someone's tibias, femurs, or arm, as accurate application of retaliation cannot be guaranteed. As for breaking someone's tooth, the *qiṣâṣ* can be accurately applied by rasping the tooth of the perpetrator until it becomes just like that of the victim broken by the former.

Second: There must be equivalence between the part of the body of the offender and that of the victim in both name and location. That is, a right organ is not to be cut off in retribution for cutting off a left one and vice versa; this applies to hands, legs, eyes, ears, and the like. This is because each of the aforementioned organs has a specific name and use, so they are different from each other. For example, a little finger is not to be cut off in retaliation for a ring finger, for each has a different name. Similarly, a main body part is not to be cut off for a secondary one.

Third: The body part of the perpetrator in question must be in the same condition as that of the victim regarding soundness and completion. So, a sound, functional hand or leg is not to be cut off in retaliation for a paralyzed one. Likewise, a hand or leg with complete fingers is not to be cut off for a defective hand or leg. Furthermore, the *qiṣâṣ* is not to be applied to a sound eye for a blind one, as they are not equal. Similarly, a sound, articulate tongue is not to be cut off in retribution for a speechless one, due to the inferiority of the latter.

Contrarily, a defective organ can be cut off in retribution for a sound, complete organ. That is, a paralyzed limb can be cut off for a functional one, and a defective limb (such as one having incomplete fingers) can be cut off in retaliation for a sound one. This is because the defective organ is similar to the sound organ in respect of the nature of creation, but they differ in quality. Moreover, by cutting off the defective organ, the one who has the right of *qiṣâṣ* receives part of his right, so there will be neither injustice nor excessiveness. And if he is not satisfied, it is permissible for him to receive the *diyah* (indemnity) instead.

Qiṣâṣ for Wounds

The *qiṣâṣ* is to be carried out for every wound that reaches the bones, as it can be exacted with neither injustice nor excessiveness, such as the wound of the head, face, upper arm, leg, thigh and foot. This is because Allah, Exalted be He, says:

"...and for wounds is legal retribution..."

(Qur'ân: Al-Mâ'idah: 45)

As for the wounds that do not reach the bones, it is impermissible to apply the *qisâs* to them, even if they are head wounds or the like. To illustrate, there is no retribution applicable as regards the case of the wound in the internal part of the abdomen, the chest or the upper part of the chest, as the depth of the wound cannot be specified so there is no assurance that there will be neither injustice nor excessiveness. In this regard, Ibn Mâjah related that the Prophet (PBUH) said,

> *"No qisâs is to be executed in a skull-fracturing wound, an abdomen deep flesh-cutting wound, nor a bone-breaking-and-dislocating wound."*[2]

Moreover, **Shaykhul-Islâm Ibn Taymiyah** (may Allah have mercy on him) said:

> *"The qisâs for wounds is stated by the Noble Qur'ân, the Sunnah and the consensus of Muslim scholars, provided that the retaliatory injury is just like the original one. That is, if the head of a person is fractured by someone, the injured person has the right to retaliate for it in the same way. But if it is unattainable to exact just, accurate retribution, as in the case of breaking an internal bone or any other kind of head fracture less in degree than a bone-clearing wound, retribution becomes impermissible, and the diyah (indemnity) becomes obligatory instead."*

As for applying the *qisâs* in cases of striking someone with the hand, a stick, a whip, or the like, **Shaykhul-Islâm Ibn Taymiyah** said:

> *"Some scholars say that there is no retribution (qisâs) in such cases, but there must be a discretionary punishment. However, it is reported that the Rightly-guided Caliphs, the Companions and their Followers maintained the permissibility of carrying out the qisâs in such cases. The latter opinion is the one adopted by Imâm Ahmad and other faqihs, and it is the one stated in the Sunnah of Allah's Messenger (PBUH); this is the sound opinion in this regard. In support of this view, 'Umar Ibnul-Khattâb (may Allah be pleased with him) said to his subjects, 'I do not send my governors to strike your bodies. By Him in Whose Hand my soul is, I shall carry out the qisâs against whoever (governor) does so, as I have seen the Messenger of Allah (PBUH) applying the qisâs to himself.'*[3]
>
> (Related by Imâm Ahmad)

This is when the governor impermissibly strikes his subjects. Yet, due to the scholars' consensus, there is no qisâs against the governor if he legally strikes them."[4]

Moreover, **Ibnul-Qayyim** (may Allah have mercy on him) said:

*"The Shâfi`î, Hanafî, Mâlikî, and late Hanbalî scholars maintain that there is no retribution for a slap or strike. Some of them claim that there is a juristic consensus on this, exceeding the analogical deduction, the obligation stated in the legal texts (of the Qur'ân and Sunnah) as well as the consensus of the Prophet's Companions. Moreover, Allah, Exalted be He, says, '**And if you punish [an enemy, O believers], punish with an equivalent of that with which you were harmed...**'* (Qur'ân: An-Nahl: 126) *Hence, it is for the person slapped or struck to do the same to the person who has done it, returning like for like; a slap for a slap and a strike for a strike, in the same spot and with the same tool or a similar one. This makes it so close to achieve the prescribed equality in qisâs reasonably and legally as a discretionary punishment void of transgression and anything related to it. This is the opinion derived from the guidance of Allah's Messenger (PBUH) and the Rightly-guided Caliphs, the analogical deduction, and the texts containing the opinions of Imâm Ahmad."*[5]

Endnotes

1 Al-Bukhârî (2703) [5/376] and Muslim (4350) [6/164].
2 Ibn Mâjah (2637) [3/273].
3 Abû Dâwûd (4537) [4/438].
4 See the footnote of "*Ar-Rawd Al-Murbi`*" [7/221].
5 See: "*I`lâm Al-Muqi`în*" [1/294].

CHAPTER

4

Qiṣâṣ When a Group Kills an Individual

When a group of people premeditatedly and wrongfully kills an individual, the whole group is to be killed in *qiṣâṣ* according to the most preponderant opinion adopted by the Muslim scholars (may Allah have mercy on them). This opinion is based on the general meaning of the Qur'anic verse in which Allah, Exalted be He, says:

> ***"O you who have believed, prescribed for you is legal retribution for those murdered... And there is for you in legal retribution [saving of] life, O you [people] of understanding, that you may become righteous."*** (Qur'ân: Al-Baqarah: 178-179)

The aforementioned opinion is also the one unanimously maintained by the Prophet's Companions. To illustrate, Sa'îd Ibnul-Musayyab reported that 'Umar Ibnul-Khaṯṯâb (may Allah be pleased with him) had killed seven

men of the people of Sana in retribution for killing one man. `Umar said: *"If all the people of Sana had acted together in killing him, I would have killed them all in qisâs."*[1] It is also stated that other Companions were of the same opinion, and they would kill a group of people in retribution for killing one person; there was none who disagreed with them, so there was a consensus on this juristic view.

In this respect, the great Muslim scholar **Ibnul-Qayyim** (may Allah have mercy on him) said: *"The Companions and the majority of faqîhs unanimously agree on the ruling that a group of people are to be killed (in retribution) for killing one person, though it may appear to contradict the basic principle of qisâs, namely saving of lives. They maintain so as not to let the non-application of the qisâs to a group of murderers be the pretext for further conspiracy to shed blood."*[2]

Moreover, **Ibn Rushd** (Averroës) said: *"The wisdom behind the application of the qisâs for murder is to avoid further murder as stated in the Qur'ân. Thus, if a group of conspirators is not killed in retribution for killing an individual, people will band together in killing. Another reason is that retaliation and deterrence are not attained except through killing all the murderers (in qisâs)."*[3]

In this regard, a group of murderers is killed for killing an individual provided the action of each member of the group is fatal. In other words, to kill them all in *qisâs*, it is a condition that all of them have participated in killing the victim, and that the deed of each one of them has been enough to cause death if done separately, so each of them is considered a separate murderer. Even if the deed of each one of them is not separately fatal and they have worked together in killing the victim, the *qisâs*, namely killing them all, is obligatory, as the indirect actions of some of them have supported the direct actions of the rest, resulting in the murder. Similarly, if a person is forced by someone to kill another, it is obligatory to apply the *qisâs* for murder to both of them (i.e. to kill both), the murderer and the one who compelled him to do it, provided the conditions for the validity of fulfilling the *qisâs* are met. This is because the murderer meant to preserve his own life by killing another, and the one who has compelled him to do it has been the instigator and direct cause of certain death. However, if the murder is committed by a minor or an insane person due to the order of someone, only the latter, who has given the order, is to be killed in *qisâs*. This is because the murderer has just been a tool used by such a person, so the *qisâs* is to be applied only to him as the real cause of the murder, not to the one used as a tool. Likewise, if the murderer is a legally accountable person (i.e. adult and sane) but unaware of the prohibition

of killing, such as those brought up in non-Islamic countries, the *qiṣâṣ* is to be applied only to the instigator. It is not to be applied to the perpetrator due to his ignorance of the prohibition of killing, so the *qiṣâṣ* is applied to the real cause of the murder, namely the instigator. On the other hand, if the one ordered to murder is a legally accountable person and aware of the prohibition of killing, then the *qiṣâṣ* is to be applied to him as well, as he has committed the murder without right. In this regard, the Prophet (PBUH) says, *"No person is to be obeyed in a matter of disobedience to the Creator."*[4] This is the rule to follow, whether the accessory is a ruler, a master or whoever. Moreover, the one who enjoins such deeds of disobedience to Allah should be discretionarily punished according to what the Imâm of Muslims (the ruler or the one in authority) judges. This is because such an accessory is considered to have committed an act of disobedience to Allah, so he has to receive a discretionary punishment as a means of deterrence.

Furthermore, if two persons conspired and premeditatedly killed someone unjustly, and one of the two does not meet the conditions for the application of the *qiṣâṣ*, it is to be applied only to the other one who meets them (i.e. he is to be killed in *qiṣâṣ*), as he has participated in a murder intentionally and wrongfully. That is, the *qiṣâṣ* for murder, namely capital punishment, is not to be applied to his partner due to the absence of the conditions obligating the *qiṣâṣ* on him, not due to absence of the reason for the *qiṣâṣ*. Accordingly, the *qiṣâṣ* is to be applied to the one who meets the conditions obligating it. In this connection, if someone holds a person for someone else to kill, the killer is to be killed in *qiṣâṣ*, and the other, who has held the victim for him, is to be given life imprisonment.

The ruling applied to the group killing an individual is the same ruling applied in the case of injuries to parts of the body and wounds caused by a group to an individual. To clarify, if a group of people participates in damaging or cutting off a part of the body of a person or wounding him, the *qiṣâṣ* (namely a similar injury) is applied to every member of the group, provided their actions in the crime are undistinguished from one another. For example, if they put a piece of iron on the hand of a person and begin to press heavily on it until his hand is cut off, then the hands of them all are to be cut off in *qiṣâṣ*. This is based on the fact that two witnesses came to 'Alî Ibn Abû Ṭâlib (may Allah be pleased with him) and testified against someone that he had stolen. Thereupon, 'Alî ordered to amputate the hands of the thief (as a prescribed punishment). After that, they (the two witnesses) came to him along with another person and said, "This is the real thief, as we were wrong concerning the first one."

'Alî Ibn Abû Tâlib rejected their testimony concerning the second man and obligated them to pay an indemnity to the first, and said to them: *"If I thought you had intentionally testified against the first, I would have amputated your hands."*[5] (This narration is related by Al-Bukhârî in a *mu'allaq*[6] form and related by others as well) This incident indicates that the *qisâs*, namely cutting their hands off, would have been applied if they had intentionally testified against the man. This is also supported by analogical deduction regarding the case when a group of people kills an individual, in which case the *qisâs* is killing the murderers. The *qisâs* is estimated according to the consequence of the offense, whether the consequence is death or a minor result. This is because the resulting effect of an offense is the actual crime. To illustrate, if someone cuts off a finger of another, and the wound causes other fingers or the entire hand to be cut off (due to gangrene for example), then the similar hand of the offender is to be cut off in *qisâs*, not just a finger. Moreover, if the injury spreads to the rest of the body until it causes the death of the victim, the perpetrator is to be killed in *qisâs* for murder.

It is impermissible to apply the *qisâs* for an injury or a wound before it heals to verify that there is no further damage. This is due to the *hadîth* narrated by Jâbir (may Allah be pleased with him) in which he said:

> *"A man was wounded and he wanted qisâs to be applied to the offender. However, the Prophet (PBUH) forbade applying qisâs to the culprit until the wounded person was wholly recovered."*[7]
>
> (Related by Ad-Dâraqutnî and other compilers of *Hadîth*)

This is surely in the best interest of the victim, as it verifies that the wound will neither affect the function of any other part of the body nor cause death. Therefore, if the claimer opposes this ruling and exacts the *qisâs* before he wholly recovers, and then his wound spreads and affects another part of the body, he has no right to seek any kind of *qisâs* for the effects of the injury. In this regard, 'Amr Ibn Shu'ayb, on the authority of his father and his grandfather respectively, narrated:

> *"A man stabbed another in his knee with a horn, so the injured man came to the Prophet (PBUH) and said, 'I want to apply the qisâs (i.e. to cause the offender an equal injury).' The Prophet (PBUH) said to him, 'Only when you are recovered.' Then the man came again (before recovery) and said, 'I want to apply the qisâs.' So, the Messenger of Allah (PBUH) enabled him to execute the qisâs. After*

that, the man came to the Prophet and said, 'O Messenger of Allah! I am limping.' Thereupon, the Prophet (PBUH) said, 'I forbade you (to apply the qisâs until you verify you are wholly recovered) but you disobeyed me, so Allah disgraced you, thus, you have no right to ask for qisâs for the lameness that afflicted you.' Then the Messenger of Allah (PBUH) forbade executing qisâs for injuries until the injured person was completely recovered.' "[8]

(Related by Imâm Ahmad and Ad-Dâraqutnî)

Hereby, Muslims come to know the virtues of their *Sharî`ah* (Islamic Law) and realize the perfect justice and the broad mercy it encompasses. True are the Words of Allah, Exalted be He, Who says:

"And the Word of your Lord has been fulfilled in truth and in justice. None can alter His Words, and He is the Hearing, the Knowing." (Qur'ân: Al-An`âm: 115)

So, woe to those who replace the sacred *Sharî`ah* with unjust, innovated, defective, imperfect laws. Allah, Exalted be He, says about such people and their innovated laws:

"...Wretched it is for the wrongdoers as an exchange."

(Qur'ân: Al-Kahf: 50)

All praise be to Allah, Lord of the Worlds.

Endnotes

1 `Abdur-Razzâq (18075) [9/476] and Ad-Daraqutnî (3427) [3/142].
2 See the footnote of "*Ar-Rawd Al-Murbi`*" [7/180].
3 See: "*Bidâyat Al-Mujtahid*" (2/489).
4 Ibn Abû Shaybah (33706) [6/549], Al-Bukhârî (7257) [13/286], and Muslim (4742) [6/430].
5 Ad-Daraqutni (3361) [3/128] and Al-Bukhârî [12/282].
6 *Mu`allaq* (Suspended) *Hadith*: It is the *hadith*, the beginning of whose chain of transmission has one or more successive narrators missing, even until the end of the chain of transmission.
7 Ad-Dâraqutni (3092) [3/71] and Al-Bayhaqi (16112) [8/117].
8 Ad-Dâraqutnî (3091) [3/71] and Al-Bayhaqi (16115) [8/118].

CHAPTER

5

Diyah (Blood Money)

Diyah (blood money) is the money paid by the offender to the victim or his legal representative as legal compensation.

Its Ruling

Diyah (blood money) is obligatory according to Allah's Book, the Qur'ân, the *Sunnah* (Prophetic Tradition) and the consensus of Muslim scholars. Allah, Exalted be He, says:

> ***"...And whoever kills a believer by mistake – then the freeing of a believing slave and a compensation payment [diyah] presented to his [i.e. the deceased's] family..."*** (Qur'ân: An-Nisâ': 92)

Moreover, it is stated in a *sahih hadith* that the Prophet (PBUH) says:

> *"He whose relative is murdered has to choose one of two ways; either to accept the diyah (blood money) or execute the qisâs."*
>
> (Related by the Group of Compilers of *Hadith*)

Hence, the *diyah* is obligatory to be paid by whoever kills a person directly, such as hitting a person or running over him by a car. The same applies when one is a causative factor in killing another, such as digging a hole on the road or blocking it with a stone causing another's death, whether the victim is a Muslim, Dhimmi,[1] one of a people who are not Muslims' enemies, or one of a people engaged in a peace treaty with Muslims. This is because Allah, Exalted be He, says:

> ***"...And if he was from a people with whom you have a treaty – then a compensation payment presented to his family..."***
>
> (Qur'ân: An-Nisâ': 92)

Diyah (Blood Money) for Premeditated Murder

If the murder is intentionally committed, the *diyah* is to be paid from the killer's own money, as the original rule states that the compensation for an offense is obligatory to be paid by the offender. In this regard, **Al-Muwaffaq Ibn Qudâmah** said:

> *"Muslim scholars unanimously agree that the diyah for premeditated murder is obligatory to be taken from the murderer's wealth according to the original rule, not to be paid by the perpetrator's agnate relatives. Allah, Exalted be He, says, '...**And no bearer of burdens will bear the burden of another...**'* (Qur'ân: Al-An'âm: 164)"[2]

However, this original rule – that the *diyah* is to be paid from the perpetrator's own money – is inapplicable in the case of manslaughter. This is because cases of manslaughter recurrently happen and the amount of *diyah* for killing a human being is very large. Thus, it would be unfair if the offender had to pay it alone. Therefore, wisdom necessitates that such a large amount of *diyah* is to be paid by the offender's agnate relatives as a means of helping and supporting the offender and a way of relieving him as his case is excusable. However, in the case of premeditated murder, the murderer has no excuse for his crime, so he deserves no commutation of penalty; rather, killing him as *qiṣâṣ* (legal retribution) is applicable to him. Yet, if the premeditator murderer is pardoned by the deceased's family or legal representatives, i.e. they decide not to kill him in retaliation, he is to be burdened by paying the *diyah* alone, without his relatives' support, as a means of redeeming his life. Thus, the *diyah* becomes obligatory for him to pay, just like the obligation of paying indemnity for damages.

Diyah for Quasi-premeditated Murder and Manslaughter

The *diyah* in these two cases is to be paid by the perpetrator's agnate relatives. To illustrate, Abû Hurayrah (may Allah be pleased with him) narrated:

> *"Two women from (the tribe of) Hudhayl fought with each other and one of them hit the other with a stone that killed both her and the fetus she carries. The killer's agnate relatives and those of the victim submitted their case to the Prophet (PBUH) who judged that the diyah for the fetus was a male or female slave, and that for the murdered woman was to be paid by the murderer's agnate relatives."*
>
> (Related by Al-Bukhârî and Muslim)

This *hadîth* indicates that the *diyah* for quasi-premeditated murder is to be paid by the family of the offender.

Concerning the *diyah* for manslaughter, **Ibnul-Mundhir** said:

> *"All the juristic scholars, on whose rulings we rely, unanimously agree that the diyah (blood money) for manslaughter is to be paid by the agnate relatives of the perpetrator."*[3]

Moreover, **Al-Muwaffaq** said:

> *"We are not acquainted with any disagreement among scholars on the fact that it (i.e. the diyah for manslaughter) is to be paid by the agnate relatives of the perpetrator."*[4]

The same ruling also applies to the cases similar to manslaughter, such as falling on someone while asleep and killing him, digging a well or a hole excessively where someone falls therein and dies, and suchlike cases.

However, the *diyah* is not required when killing is the result of legally permissible matters, such as discipline and the like. For example, if a man kills his wife or son while disciplining them, or if a ruler kills any of his subjects while disciplining him, there is no *diyah* imposed on the killer. This is because discipline is a legally permissible deed, provided the killer has not been excessive nor has he transgressed the customary limits while disciplining them. Otherwise, if there is excessiveness or transgression and death is the result, then the *diyah* is to be paid.

In this concern, if disciplining a pregnant woman causes her abortion, the perpetrator is to pay the *diyah* for killing the fetus, namely giving a male or female slave as *diyah*. This is due to the *hadîth* recorded in the Two *Sahîhs*[5]

which states that the Prophet (PBUH) gave the judgment that a male or female slave is to be given as the *diyah* for causing a woman's abortion[6]. This is the opinion adopted by the majority of scholars.

It may happen that someone scares a pregnant woman that causes her abortion, as when a mighty ruler summons her or when an enemy of hers turns people of high of authority against her. In such cases, the doer is liable for the *diyah* for killing the fetus, as the doer is the main cause for its death. To exemplify, 'Umar Ibnul-Khaṯṯâb, the great Muslim Caliph, sent for a woman whose husband was absent and there were some people who used to visit her. Thereupon, she said:

> *"Woe to me! Why does 'Umar send for me?" On her way to 'Umar, being scared at the idea of meeting him, she suffered from the throes of childbirth and gave birth to a male baby who just cried twice and died. 'Umar asked some of the Prophet's Companions about the legal judgment concerning this incident and some of them said to him, 'There is no blame on you concerning that (i.e. you are not guilty).' Thereupon, 'Alî Ibn Abû Ṯâlib (may Allah be pleased with him) said, 'If they say that to satisfy you, then they are not sincere to you. You are to pay the diyah (blood money) for the baby, as you have scared her (by summoning her) so she gave birth to him untimely.'"*[7]

Furthermore, whoever orders a legally accountable person to descend a well, climb a tree, or the like, and that person falls down and dies while fulfilling the order, the former is not liable for any *diyah*, as he has done him neither wrongdoing nor transgression. Yet, if the victim is not a legally accountable person, then the person who has ordered him is liable for the *diyah*, as he is the cause of the victim's death. In addition, if a person hires someone to descend a well or climb a tree for example and that hired person dies during performing the task, the hirer will not be liable for any *diyah*, as there is neither transgression nor assault on his part. Similarly, whoever hires someone to dig him a well in his house and the hired person dies due to an accidental collapse not caused by anyone, the hirer will not be liable for anything, as there is no transgression on his part.

Hence, we realize to what extent Islam takes an interest in the preservation of lives and the prevention of bloodshed. Nevertheless, carelessness and negligence have become so widespread nowadays that some people drive heedlessly and recklessly endangering their lives as well as the lives of others. Many an innocent soul is destroyed as a result of such heedlessness! Nowadays,

the death of an entire group of people or a whole family can simply be caused at the hands of a youth driving his car recklessly and irresponsibly without the least consideration of the consequences. Unfortunately, the parents of such heedless youth and teens may be the cause of such tragedies, as they buy them luxurious cars as if urging them to destroy innocent lives. In this way, such parents give their children fatal weapons to play with, playing with the lives of innocent people, causing them panic as well.

Those people have to fear Allah concerning the way they bring up their children in their best interest, safeguarding their lives and the lives of others. Moreover, those in authority have to deter whoever deserves deterrence to guarantee safety, security, and stability, for Allah may make authority the means of a more powerful deterrent – to some people – than the teachings of the Qur'ân.

Endnotes

1 *Dhimmî*: A free non-Muslim living in and under the protection of an Islamic state.
2 See: "*Al-Mughnî*" (2/28).
3 See: "*Al-Ijmâ'*" (p. 74).
4 See: "*Al-Mughnî*" (12/21).
5 The Two *Sahîhs*: the Two Authentic Books of Al-Bukhârî and Muslim.
6 Al-Bukhârî (7317) [13/365] and (6740) [12/30] and Muslim (4373) [6/179] and (4366) [6/176].
7 'Abdur-Razzâq (18010) [9/458].

CHAPTER

6

Amounts of *Diyah* (Blood Money)

An amount of *diyah* differs on basis of Islam, freedom, gender, and whether the murdered human is existent or still a fetus. The greatest amount of *diyah* is the amount paid for killing a Muslim free man; it is a thousand *mithqâls*[1] of gold, twelve thousand dirhams (Islamic dirhams of which every ten equal seven *mithqâls* of gold),[2] a hundred camels, two hundred cows, or two thousand sheep. This is according to the *hadîth* related by Abû Dâwûd on the authority of Jâbir (may Allah be pleased with him) that goes:

> *"The Messenger of Allah (PBUH) gave judgment that the diyah to be paid by those possessing camels is one hundred camels, by those possessing cows is two hundred cows, and by those possessing sheep is two thousand sheep."*[3]

In addition, 'Ikrimah reported on the authority of Ibn 'Abbâs:

"A man was killed and the Messenger of Allah (PBUH) gave judgment that the diyah to be paid was twelve thousand dirhams." [4]

(Related by Abû Dâwûd and Ibn Mâjah)

Moreover, it is stated in the letter the Prophet (PBUH) gave to 'Amr Ibn Ḥazm:[5]

"One thousand dinars are to be paid (as diyah) by the people possessing gold."

(Related by An-Nasâ'î)

Scholars disagree as to which of the aforementioned types should be regarded as the original type of *diyah*, i.e. the sufficient one. In other words, they disagree regarding which type the guardian of a killed person is obliged to accept if the *diyah* is paid in. According to some scholars, the victim's guardian is obliged to accept whatever type of the above-mentioned *diyah*, regardless of whether the guardian is originally a possessor of that type or not, as long as the payer has fulfilled his obligation. A second opinion, which is the judgment maintained by the majority of scholars, stipulates that only camels are the main type to be paid as *diyah*. They base their opinion on the following two *ḥadîths*: the Prophet (PBUH) said:

"(The diyah) for (killing) a believing soul (i.e. person) is one hundred camels."

And:

"Verily, the diyah for quasi-premeditated murder is one hundred camels."

Abû Dâwûd also related that 'Umar Ibnul-Khaṭṭâb (may Allah be pleased with him) once delivered a sermon and said:

"Camels have become dear," so he decreed that the diyah to be paid by those possessing gold is one thousand dinars,[6] by those possessing silver twelve thousands, by those possessing cows two hundred cows, by those possessing sheep two thousand sheep, and by those possessing garments two hundred garments."[7]

Since the Messenger of Allah (PBUH) was strict concerning the payment of camels as *diyah* in cases of premeditated murder and was lenient in this regard in cases of manslaughter, then camels are the original type to be paid as *diyah*; this is also the opinion upon which scholars unanimously agreed. In fact, this is the preponderant opinion in this regard, according to which the other aforementioned types of *diyah* are subsidiary and dependent on estimation.

In cases of premeditated and quasi-premeditated murders, the *diyah* of camels, which are one hundred camels, are paid exactly by being divided into four parts; twenty five one-year-old she-camels, twenty five two-year-old she-camels, twenty five three-year-old she-camels, and twenty five four-year-old she-camels. That is according to the following narration of Az-Zuhri on the authority of As-Sâ'ib Ibn Yazîd, who said:

> *"During the lifetime of the Messenger of Allah (PBUH), the diyah was divided into quarters: twenty five one-year-old she-camels, twenty five two-year-old she-camels, twenty five three-year-old she-camels, and twenty five four-year-old she-camels."*

So, if the payer of *diyah* pays it in this fashion, the guardian of the murdered person is obliged to accept it. Moreover, the payer can pay the value of each of the four groups of camels according to their estimated price if he likes.

As regards manslaughter, the *diyah* is not that strict; the hundred camels are divided into five groups: twenty one-year-old she-camels, twenty two-year-old she-camels, twenty three-year-old she-camels, twenty four-year-old she-camels, and twenty one-year-old he-camels, or the value of these five groups according to their estimated price.

The *diyah* to be paid for killing a free man of the People of the Scripture (the Jews and the Christians) equals half the *diyah* paid for killing a Muslim, be he a *Dhimmî*, one of a people who are not Muslims' enemies, or one of a people engaged in a peace treaty with Muslims. This ruling is based on the following *hadith* narrated by 'Amr Ibn Shu'ayb on the authority of his father and his grandfather respectively:

> *"The Messenger of Allah (PBUH) gave judgment that the diyah for (killing one of) the People of the Scripture is half the diyah paid for (killing) a Muslim."*[8]
>
> (Related by Imâm Ahmad, Abû Dâwûd, and other compilers of *Hadîth*)

The *diyah* paid for killing a magus is eight hundred Islamic dirhams[9] (of which every ten equal seven *mithqâls*[10] of gold), be he a *Dhimmî*,[11] one of a people who are not Muslims' enemies, or one of a people engaged in a peace treaty with Muslims. This judgment is based on the following *marfû'* (traceable) *hadith* reported by Ibn 'Adiyy on the authority of 'Uqbah Ibn 'Âmir (may Allah be pleased with him) that the Prophet (PBUH) said:

> *"The diyah paid for killing a Magi is eight hundred dirhams."*[12]

This is the opinion maintained by most scholars.

The *diyah* paid for killing a female Jew, Christian, Magi, or Pagan is half the *diyah* paid for their males, just like the *diyah* paid for killing a Muslim woman is half the *diyah* paid for killing a Muslim man. **Ibnul-Mundhir** said in this connection, *"Scholars unanimously agree that the diyah paid for killing a Muslim woman equals half the diyah paid for killing a Muslim man. It is stated in the letter the Prophet (PBUH) gave to `Amr Ibn Hazm: "The diyah paid for killing a woman is half the diyah paid for killing a man.""*[13]

The great Muslim scholar **Ibnul-Qayyim** (may Allah have mercy on him) said:

> *"Women are not equal to men and are not as beneficial as men are. Men can assume religious offices, assume guardianships, observe night watching, perform the duty of jihâd (fighting in the Cause of Allah), establish civilizations, perform crafts indispensable for human life, protect their people and preserve religion, unlike women. Hence, the diyah paid for killing a woman is not equal to that paid for killing a man. Since women are not equal to men, the Lawgiver*[14] *rendered a woman's diyah half a man's diyah."*[15]

In cases of wounds, the *diyah* of a woman is equal to that of a man as long as the legal amount to be paid is less than the third of the *diyah* for murder. This is based on the *marfû`* *hadîth* narrated by `Amr Ibn Shu`ayb on the authority of his father and his grandfather respectively; the Prophet (PBUH) said:

> *"The diyah (indemnity for a wound) of a woman is equal to that of a man unless it does not reach a third of the man's diyah (blood money)."*[16]

This *hadîth* was related by An-Nasâ'î, and the ruling therein was stated as *Sunnah* (Prophetic Tradition) by Sa`îd Ibnul-Musayyab.

Ibnul-Qayyim also said:

> *"Although Abû Hanîfah, Ash-Shâfi`î, and others disagree with that ruling, maintaining that the diyah of a woman is half that of a man in all cases, the Sunnah is more deserving to be followed. If, in cases of wounds, a woman is paid half of the diyah, i.e., half a man's diyah for a similar wound, it will be too little to compensate an afflicted woman. Therefore, in cases of wounds, a woman's diyah (indemnity) is equal to that of a man as long as it does not reach third of the man's diyah (blood money) paid in case of murder. A woman's diyah*

is made equal to that of a man, not half of it, as long as it is less than the third of the amount of the man's diyah in case of murder, so that a woman may be compensated sufficiently. For this same reason, the diyah paid for killing a fetus, male or female, is the same because the diyah of a fetus is already so little. The same ruling on fetuses is applied to the value of diyah for a woman's wound as long as it does not reach one third of the man's diyah for a murder."[17]

The *diyah* for a serf is equal his/her worth, be the serf a male or a female, a child or an adult, with no maximum amount, as long as it does not exceed a free man's *diyah*, as scholars unanimously agree. However, Ahmad, Mâlik, Ash-Shafi'î, and Abû Yûsuf maintain that a serf's *diyah* is equal his/her worth, even if it exceeds the *diyah* of a free man.

If a pregnant woman is assaulted and she has suffered abortion as a result, the *diyah* for the dead fetus, be it male or female, is a *ghurrah*, which is a child male or female serf whose value is estimated as five camels. This is according to the *hadîth* narrated by Abû Hurayrah (may Allah be pleased with him) that states:

"The Messenger of Allah (PBUH) gave the judgment that a ghurrah is to be given (as diyah) for an abortion case of a woman from (the tribe of) Banû Lahyân."[18]

(Related by Al-Bukhârî and Muslim).

According to the majority of scholars, that *ghurrah* (the serf or the five camels), which equals one tenth of the *diyah* (blood money) paid for killing a woman, is inherited by the dead fetus' legal heirs, because it is the *diyah* for its murder.

Endnotes

1 *Mithqâl*: A standard measure that equals 4.25 grams
2 A dirham of silver equals 2.975 grams of silver.
3 Abû Dâwûd (4544) [4/441].
4 Abû Dâwûd (4546) [4/443], At-Tirmidhî (1392) [4/12], An-Nasâ'î (4807) [4/413], and Ibn Mâjah (2629) [3/268].
5 The Prophet (PBUH) ordered that this letter be written and given to 'Amr Ibn Hazm to deliver it to the people of Yemen.

6 Dinar: An old Arab coin that equals 4.25 grams of gold.
7 Abû Dâwûd (4542) [4/441].
8 An-Nasâ'i (nos 4868-4872) [4/428-430].
9 A dirham of silver equals 2.975 grams of silver.
10 *Mithqâl*: A standard measure that equals 4.25 grams.
11 *Dhimmi*: A free non-Muslim living in and under the protection of an Islamic state.
12 Abû Dâwûd (4583) [4/459], At-Tirmidhi (1417) [4/25], An-Nasâ'i (4820) [4/414], and Ibn Mâjah (2644) [3/276].
13 Al-Bayhaqî in his "*As-Sunan*" (16344) [8/176], At-Tirmidhî (4/26), and Al-Bayhaqi (16338) [8/175].
14 The Lawgiver of the *Shari'ah* (Islamic Law) is Allah, Exalted be He; the term can also refer to the Prophet (PBUH) as he never ordained but what was revealed to him by Allah.
15 See: "*I'lâm Al-Mwaqi'in*" [2/149] and "*Zâdul-Ma'âd*" [3/205].
16 An-Nasâ'i (4819) [4/414].
17 See: "*I'lâm Al-Mwaqi'in*" [2/148-149].
18 Al-Bukhârî (6740) and An-Nasâ'î (4821).

CHAPTER 7

Diyah (Indemnity) for Body Organs, Senses and Functions

First: *Diyah* (Indemnity) for Organs

Some scholars aver that there are forty-five organs in the human body. Some of these organs are unique, others are in pairs, and some are more than two parts. If a unique organ, such as the nose, the tongue, or the male organ, is damaged, *diyah* (indemnity) for it equals the *diyah* (blood money) paid if the injured person was murdered. Therefore, the amount of *diyah* is estimated on the previously defined basis, whether the injured person is male or female, free or a slave, Muslim or not. This is because damaging a sole organ that Allah has created unique damages the entire function of that organ. This is what makes it similar to murder, hence deserving *diyah* equal to that paid in cases of murder as agreed upon by all scholars. It is stated in the letter the Prophet (PBUH) gave to `Amr Ibn Hazm:

"The male organ (if cut off or wholly damaged) necessitates the total amount of diyah (blood money); and (similarly) the nose, if cut off or wholly damaged, necessitates the total amount of diyah; and (similarly) the tongue necessitates the total amount of diyah."

(Related by Ahmad, An-Nasâ'î, and deemed *sahîh* (authentic) *hadith* by Ahmad, Ibn Hibban, Al-Hâkim, and Al-Bayhaqî)

As for the body organs existing in pairs, they are, for example, the eyes, the ears, the lips, the jaws, the breasts, the hands, the arms, the legs, and the testicles. If the pair of organs is damaged, the total amount of *diyah* is to be paid; if one of them is damaged, half the *diyah* is to be paid, because their importance lies in their function, aesthetic value, and the fact that there are only two of them in the body. Al-Muwaffaq said that there was not a single scholar who disagreed on that ruling[1].

It is stated in the letter the Prophet (PBUH) gave to 'Amr Ibn Hazm:

"The nose, if cut off or wholly damaged, necessitates the total amount of diyah (blood money); and (similarly) the tongue (if cut off or wholly damaged) necessitates the total amount of diyah; and (similarly) the lips necessitate the total amount of diyah; and (similarly) the testicles necessitate the total amount of diyah; and (similarly) the backbone necessitates the total amount of diyah; and (similarly) the eyes necessitate the total amount of diyah; and (similarly) one leg necessitates half the total amount of diyah."

Ibn 'Abdul-Barr (may Allah have mercy on him) said, *"The letter written (by the Prophet) to 'Amr Ibn Hazm is well-known to scholars. Its contents are agreed upon, with a few exceptions."*[2]

As for the human body organs consisting of three parts, if the three are damaged, the total amount of *diyah* (blood money) is to be paid, and if one is damaged, one third of the *diyah* is to be paid, and so on. For example, a nose consists of three parts, namely two nostrils and the cartilage that separates them; the *diyah* is divided among the three of them.

Regarding the body organs consisting of four parts, if the four are damaged, the total amount of *diyah* (blood money) is to be paid. If only one of the four

organs is damaged, one-fourth of the *diyah* is to be paid. The four eyelids are an example of such organs; if the four eyelids are damaged, the total amount of *diyah* is to be paid. This is because the eyelids have an aesthetic value and an important function, as they cover the eyes and protect them against hot and cold weather. So, a quarter of the total amount of *diyah* is to be paid if one of them is damaged, and so on.

If the ten fingers or the ten toes are cut off, the total amount of *diyah* is to be paid. The indemnity for each finger or toe equals one-tenth of the total amount of *diyah*. Ibn 'Abbâs narrated (in a *marfû'* *hadîth*) that the Prophet (PBUH) said:

> *"The indemnity to be paid in case the fingers or the toes are cut off is equal; ten camels for each finger or toe."*[3]
>
> (Related and deemed *sahîh* (authentic) by At-Tirmidhî)

Al-Bukhârî also related on the authority of Ibn 'Abbâs that the Prophet (PBUH) said:

> *"This and that (referring to the little finger and the thumb) are the same (concerning the due diyah)."*[4]

Those two narrations show that it is obligatory to pay the *diyah* (indemnity) in case of damaging (or cutting off) any of the fingers or the toes; one-tenth of the total amount of *diyah* is to be paid for each.

The *diyah* (indemnity) for each knucklebone of a finger or a toe is one-third of a tenth of the total amount of *diyah* (approximately 3.3%). Since each finger has three knucklebones, the *diyah* for each finger is divided among the three knucklebones. Similarly, since a thumb has only two knucklebones, the *diyah* for each is half the tenth of the total amount of *diyah* (i.e. 5%), and the same applies to the toes.

The *diyah* for each tooth is half the tenth of the total amount of *diyah*, i.e., five camels. In a *marfû'* *hadîth*, 'Amr Ibn Hazm narrated that the Prophet (PBUH) said:

> *"Five camels are to be paid (as indemnity) for a tooth."*
>
> (Related by An-Nasâ'î)

Al-Muwffaq commented, *"There is no disagreement among scholars on the fact that the indemnity for each tooth is five camels."*[5]

Second: *Diyah* (Indemnity) for Functions

The word "functions" here refers to the functions of the aforementioned organs, such as hearing, sight, smell, speech, movement, etc., due to the fact that each organ has a specific function. Thus, the four senses, namely hearing, sight, smell, and taste, are among the body functions. If any one of them is damaged, the total amount of *diyah* is to be paid in compensation. "*The majority of scholars agree that the total amount of diyah is to be paid if the sense of hearing is damaged,*"[6] said **Ibnul-Mundhir. Al-Muwaffaq** also said, "*There is no juristic disagreement on the obligation of paying the total amount of diyah in compensation for damaging someone's sense of hearing.*"[7] It is stated in the letter the Prophet (PBUH) gave to 'Amr Ibn Hazm:

> "*The total amount of diyah is to be paid for damaging someone's sense of smell.*"

During the reign of 'Umar Ibnul-Khattâb (may Allah be pleased with him), a man beat another until the latter lost his hearing, sight, sanity, and his ability to copulate. As a result, 'Umar passed a judgment that four amounts of the total amount of *diyah* were to be paid to that man (i.e. his guardian). It is noteworthy that none of the Companions objected to that judgment passed by 'Umar.

The total amount of *diyah* is to be paid for each of these functions, such as damaging someone's faculty of speech, power of reason, ability to walk, ability to eat, ability to copulate, ability to control urinating or excreting. This is because each of these functions is of a great benefit for man that it could not be compensated.

Damaging the hair of the four parts of the body (namely the hair of the head, the beard, the eyebrows, and the eyelashes) obligates paying the total amount of *diyah* (blood money) in compensation for each. If one eyebrow is damaged, half the total amount of *diyah* is to be paid. If the hair of one line of the eyelashes is damaged, a quarter of the total amount of *diyah* is to be paid, because the *diyah* is divided among the four lines of eyelashes.

This draws attention to the fact that Islam greatly respects and honors a man's beard. This is why damaging a beard necessitates the payment of the total amount of *diyah*. A man's beard is dignified thanks to its function, aesthetic value, and the solemnity it gives to one's appearance. The Messenger of Allah (PBUH) enjoined Muslims to grow their beards and groom them well. He (PBUH) prohibited Muslims from shaving their beards or cutting them short.

Therefore, woe to those who transgress by shaving their beards; they thus copy the appearance of women, disbelieving people and hypocrites, and give up their manliness to effeminacy. This is why a poet said:

"Man at times of moral affliction

May see what is ugly as perfection"

Men who follow this attitude should come to reason, reconsider their conduct, and obey the Messenger of Allah (PBUH), who ordered Muslim men to grow their beards that Allah created for them as signs of beauty and manliness.

Endnotes

1 See the footnote in "*Ar-Rawd Al-Murbi'*" [7/257].
2 See the footnote in "*Ar-Rawd Al-Murbi'*" [7/257].
3 At-Tirmidhi (1395) [4/13].
4 Al-Bukhari (6895) [12/280].
5 See: "*Al-Mughni*" (12/130)
6 See" "*Al-Ijma'*" [p. 168].
7 See: "*Al-Mughni*" (12/115).

CHAPTER

8

Diyah (Indemnity) for Wounds and Fractures

A- Wounds

Ancient Arabs defined ten kinds of face and head wounds; each of them has its own name and ruling concerning *diyah* (indemnity).

1-**Abrasion:** Injury that causes the skin to be scraped without bleeding.

2- **Scarification:** Injury that causes shallow cuts in the epidermis with little bleeding.

3-**Flesh-cutting wound:** Injury that causes both the epidermis and the flesh to be cut, but not so deeply.

4-**Deep flesh-cutting wound:** Injury that causes the flesh to be deeply cut.

5-Non-periosteous wound: Injury that causes the skin to be so deeply cut that it is about to reach the periosteum (the dense fibrous membrane covering the surface of bones).

These five kinds of wounds do not have fixed amounts of *diyah* stated by the Lawgiver. Rather, *diyah* is left to the estimation of the judge, jurist, or the one in legal authority.

6-Bone-clearing wound: Injury in which the wound is so deep that the bone is uncovered. The *diyah* for this wound is five camels, for `Amr Ibn Hazm narrated that the Prophet (PBUH) said:

"Five camels are to be paid (as indemnity) for a bone-clearing wound."

7-Bone-breaking wound: Injury in which the bone is both uncovered and broken. The *diyah* for this kind of wound is ten camels as maintained by Zayd Ibn Thâbit (may Allah be pleased with him)[1] and no one of the Prophet's Companions was known to have questioned the verity of this ruling.

8-Bone-breaking-and-dislocating wound: Injury in which the wound causes the bones to be uncovered, broken, and dislocated so that a bone would need to be both relocated and splinted. The *diyah* for such a wound is fifteen camels. It is stated in the letter written by the Prophet (PBUH) to `Amr Ibn Hazm that he (PBUH) said:

"Fifteen camels are to be paid (as indemnity) for a bone-breaking-and-dislocating wound."

9-Skull-fracturing wound: Injury that reaches the outer cover of the brain.

10-Brain wound: Injury in which the layer covering the brain is penetrated.

The *diyah* (indemnity) for the last two types of wounds equals one third of the total amount of *diyah* (blood money). This is because `Amr Ibn Hazm narrated that the Prophet (PBUH) said,

"One third of the total amount of diyah (blood money) is to be paid (as indemnity) for a skull-fracturing wound."

Since a brain wound is more serious, and can hardly be survived, no certain indemnity was specified for it, as it usually leads to death.

For a wound that reaches the inner part of the head (or the abdomen, the head, the back, the chest, the throat, etc.), one third of the total amount of *diyah* (blood money) is to be paid. It is stated in the letter given by the Prophet (PBUH) to 'Amr Ibn Hazm,

"One third of the diyah (blood money) is to be paid (as indemnity) for the wound that reaches the inner part of the head."

Imâm Al-Muwaffaq said,

"This is the opinion maintained by the majority of scholars, among them are the Scholars of Medina, those of Kufa, the Scholars of Hadîth, and the Scholars of Interpretive Opinions."[2]

B- Fractures

For a broken rib, that a splint could fix, the indemnity is one camel. The indemnity is also one camel for each of the two clavicles[3]. It was narrated that 'Umar Ibnul-Khattâb (may Allah be pleased with him) said:

"The diyah (indemnity) for (breaking) a rib is one camel[4]*. The diyah for a clavicle is one camel."*[5]

However, if a rib or a clavicle does not heal properly, a juristic assembly is to be held to estimate the proper *diyah* to be paid.

If an arm, forearm, thigh, leg, or wrist is broken and heals properly, the indemnity for it is two camels. Sa'îd narrated on the authority of 'Amr Ibn Shu'ayb:

"'Amr Ibnul-'Âs (may Allah be pleased with him) wrote to 'Umar Ibnul-Khattâb asking him about the legal diyah (indemnity) for a broken forearm. 'Umar answered him that the diyah for it is two camels, and four camels for breaking both forearms."

In addition, none of the Companions disagreed on that ruling. In cases of wounds and fractures for which no certain sums of *diyah* (indemnity) are specified, such as the spinal column and pubis, the *diyah* is to be estimated by a juristic assembly or the judge.

Al-Muwaffaq (may Allah have mercy on him) said:

"The sound opinion is that there is no juristic estimation (of indemnity) except in the five cases: a rib, any of the two clavicles, and any of the two forearms (as their indemnities are already specified). Indeed, estimation is adopted only to determine the due amount of indemnity

> *for fractures other than the aforementioned ones. According to legal proofs, estimation through juristic assembly (or the judge) is obligatory in such cases as adopted during the reign of 'Umar..."*[6]

Scholars maintain that an estimated sum of compensation for a kind of a wound that afflicts a certain body part must not exceed a fixed sum of compensation allocated for a more serious wound in the same body part. That is to say, the amount of indemnity estimated by the judge to compensate a victim for a wound less serious than a bone-clearing wound must not exceed the fixed indemnity paid in case of a bone-clearing wound, which is five camels.

If the victim completely recovers and suffers no complications, the *diyah* (indemnity) should be retroactively estimated on the basis of his state while injured, when his state is worth *diyah* (indemnity) and his life is endangered due to the effect of injury.

Endnotes

1 Al-Bayhaqi (16203) [8/144] and 'Abdur-Razzâq (17348) [9/314].
2 "*Al-Mughni*" (12/166).
3 Clavicle: A collarbone between the shoulder and the neck on each side of the body.
4 Ibn Abû Shaybah (27126) [5/380] and 'Abdur-Razzâq (17607) [9/367].
5 Ibn Abû Shaybah (26946) [5/365] and 'Abdur-Razzâq (17578) [9/362].
6 See: "*Al-Mughni*" (12/166).

CHAPTER

9

Expiation for Murder

Expiation is a coverage of and an atonement for sins. There are evidences in the Qur'ân, *Sunnah* (Prophetic Tradition), and consensus of Muslim scholars that expiation is an obligation. Allah, Exalted be He, says:

> ***"And never is it for a believer to kill a believer except by mistake. And whoever kills a believer by mistake – then the freeing of a believing slave and a compensation payment [diyah] presented to his [i.e., the deceased's] family [is required] unless they give [up their right as a] charity. But if he [i.e., the deceased] was from a people at war with you and he was a believer then [only] the freeing of a believing slave; and if he was from a people with whom you have a treaty – then a compensation payment presented to his family and the freeing of a believing slave. And whoever does not find***

[one or cannot afford to buy one] – then [instead], a fast for two months consecutively, [seeking] acceptance of repentance from Allah. And Allah is ever Knowing and Wise."
(Qur'ân: An-Nisâ': 92)

Abû Dâwûd and An-Nasâ'î related that the Messenger of Allah (PBUH) said regarding a murderer:

"Free a slave for him (i.e., for the murderer) so that Allah would free for each part of his body (the freed slave's body) a part of the murderer's from the Hellfire."

Expiation is an obligation only in cases of manslaughter and quasi-premeditated murder. On the other hand, no expiation is enjoined for premeditated murder, for Allah says:

"But whoever kills a believer intentionally – his recompense is Hell, wherein he will abide eternally, and Allah has become angry with him and has cursed him and has prepared for him a great punishment." (Qur'ân: An-Nisâ': 93)

There is nothing regarding expiation mentioned in this case.

It was also related that Suwayd Ibnus-Sâmit had intentionally murdered a man, and the Messenger of Allah (PBUH) commanded that he should be killed and did not obligate expiation in his case. Also, when 'Amr Ibn Umayyah Ad-Damrî intentionally murdered two men, the Messenger of Allah (PBUH) ordered *diyah* (blood money) to be paid to their kinfolks, and did ask 'Amr Ibn Umayyah to make any expiation. The wisdom behind expiation is the alleviation of the sin, as manslaughter in most cases results from inattentiveness, unlike the major sin of premeditated murder, which is too grave to be alleviated by expiation.

Shaykhul-Islâm Ibn Taymiyah (may Allah have mercy on him) said:

"No expiation is enjoined for premeditated murder, nor is it for perjury. And this is not commutation of the penalty to be applied to the sinner."[1]

Moreover, **Muwaffaqud-Dîn Ibn Qudâmah** et al. maintain that:

"Manslaughter can neither be classified as a prohibited nor permissible act, for it is just like the case of a murder committed by a demented person. However, since it (manslaughter) causes the expiry of a human soul, which enjoys a state of sanctity and preservation, expiation becomes obligatory in this case..."

According to the above, the wisdom behind the prescription of expiation for manslaughter lies in two points:

First: Manslaughter is always the result of the murderer's negligence and inattentiveness.

Second: Expiation is enjoined due to the sanctity of the human soul exterminated.

As for premeditated murder, there is no expiation called for in such a case, as expiation cannot alleviate such a grave sin. Nevertheless, remorse, repentance, and giving oneself up to the authorities for retaliation, assuage a murderer's sin. Hence, his duty towards Allah will be fulfilled through repentance, and that towards the victim's guardians through retaliation, unless they grant him forgiveness. Only the right of the victim remains unfulfilled and Allah would compensate him in the way He pleases. This is the opinion maintained by Ibnul-Qayyim in this regard, as stated in his *Al-Jawâbul-Kâfi* (*The Sufficient Answer*)[2].

A person who commits manslaughter against any inviolable soul, even if it was that of a slave, a disbeliever under a covenant with Muslims, or a fetus through assaulting its mother, must expiate for it. Allah, Exalted be He, says:

> ***"...And whoever kills a believer by mistake – then the freeing of a believing slave and a compensation payment [diyah] presented to his [i.e., the deceased's] family [is required] unless they give [up their right as a] charity. But if he [i.e., the deceased] was from a people at war with you and he was a believer then [only] the freeing of a believing slave; and if he was from a people with whom you have a treaty – then a compensation payment presented to his family and the freeing of a believing slave. And whoever does not find [one or cannot afford to buy one] – then [instead], a fast for two months consecutively, [seeking] acceptance of repentance from Allah. And Allah is ever Knowing and Wise."***
>
> (Qur'ân: An-Nisâ': 92)

So, expiation is obligatory in manslaughter whether the murderer commits it himself or with accomplices, directly or indirectly, as in cases of digging a big hole excessively and carelessly, setting up a knife or a pointed thing somewhere, or committing any suchlike trespasses that result in someone's death. **Al-Muwaffaq** said:

> *"Each of the accomplices (in manslaughter) is obliged to expiate for it, as maintained by most scholars, among them are Mâlik, Ash-Shâfi`î, and all Scholars of Interpretive Opinions."*[3]

According to the general meaning of the aforementioned verse, expiation for manslaughter is an obligation on the murderer with no exception, even if he was a minor, an insane person, or a slave.

The manner of expiation for manslaughter is freeing a believing Muslim slave, or, if one cannot afford emancipation, observing fast for two months consecutively. It is worth mentioning here that the feeding of an adequate number of underprivileged people is not a sufficient substitute for fasting. So, if the murderer is unable to fast, his obligation of expiation will remain unfulfilled. This is because Allah does not mention any substitute for expiation in the verse, and the availability of alternative expiation depends on legal texts, not on analogical deduction.

In case the killer in manslaughter is an insane person or a minor, his guardian is obliged to free a slave on his behalf. This is because none of them is qualified to observe fasting, nor is it permissible to observe fasting on someone's behalf. Thus, in case of manslaughter, expiation is an obligation on these two incompetent persons (an insane person or a minor) because expiation is a pecuniary duty like *diyah*, or a pecuniary act of worship like *Zakâh*.

Expiation is necessitated for each manslaughter committed by the same person, just like the case with *diyah* (blood money). However, it is noteworthy that there are some cases in which killing is permissible, such as killing a trespasser, an apostate, or an adulterer, in addition to killing in cases of retaliation, retribution, and self-defense. In such cases, no expiation is called for, because there would be no sanctity for the murdered soul.

It is important to point out that people nowadays disregard the expiation for manslaughter, although many are killed in car accidents. It usually happens that perpetrators of manslaughter are reluctant to observe fasting, especially if they have to expiate for more than one accident of manslaughter. Hence, their duty of expiation remains unfulfilled. Moreover, it has become common that the families of the manslaughter perpetrators do not pay or even share in the legal *diyah*, and those who share in it regard it as a voluntary act of charity. It is no wonder then that some perpetrators of manslaughter ask for charity in order to be able to pay the expiatory money, which hinders the fulfillment of such a religious obligation out of ignorance of such religious rulings. On the other hand, some swindlers may claim they are under debt to pay their expiatory money so that they would unjustly get charity. Such frauds might even support their lies with illegal, forged, or outdated documents, so they must be severely deterred.

Endnotes

1 See: "*Majmu'ul-Fatâwâ*" (13/170).
2 See Ibnul-Qayyim in his "*Al-Jawâbul-Kâfi*" (*The Sufficient Answer*) (p. 348-350).
3 See: "*Al-Mughni*" [10/39].

CHAPTER

10

Qasâmah (Compurgation)

Qasâmah (compurgation) refers to a number of oaths taken to clear someone from the accusation of murdering an innocent person. Such procedure of taking oath is to be followed when the body of a murdered person is found, the identity of his murderer is not known, and someone in particular is suspected.

Evidence from the *Sunnah* and the consensus of juristic scholars proves the authenticity of this practice. It is related in the Two S̲ah̲îh̲s on the authority of Sahl Ibn Abû H̲athmah,

> *"Both `Abdullâh Ibn Sahl and Muh̲ayyis̲ah Ibn Mas`ûd set forward to Khaybar. Then, Muh̲ayyis̲ah found `Abdullâh Ibn Sahl while the latter was bleeding profusely. Muh̲ayyis̲ah said to the Jews there, 'You have murdered him.' They said, 'No.' Then, (when `Abdullâh's relatives went and informed Allah's Messenger,) the Messenger of Allah (PBUH) said to them 'Would you take an oath (that the Jews did it) and be deserving of your kinsman's diyah?' (In another*

narration, he (PBUH) said to them, 'Can you provide a proof?') When they said they could not, the Messenger of Allah (PBUH) asked, 'Would you take an oath (that the Jews have killed him)?' They ('Abdullâh's relatives) replied, 'How can we take an oath while we witnessed nothing?' The Messenger of Allah (PBUH) then suggested, 'Then the Jews are to clear themselves (from the charge) by taking fifty oaths.' They ('Abdullâh's relatives) said, 'How can we trust the oaths of a disbelieving people (referring to the Jews)?' Finally, (to put an end to the dispute), the Messenger of Allah (PBUH) ordered that a hundred camels should be paid (to the victim's folks) as diyah for the murdered."[1]

This *hadîth* is an evidence that *qasâmah* is a legal procedure in Islam and that it is an independent part of *Sahrî'ah* (Islamic Law) and one of the principles of legal rulings, which particularize general proofs.

The Conditions for *Qasâmah* (Compurgation)

1- Enmity

One of the most important conditions for *qasâmah* is the existence of manifest hostility between the victim and the suspect, like the case with vindictive tribes or individuals leading to likely suspicion. The kinfolks of the victim are then entitled to take the oaths of anyone they suspect, even if they were not eyewitnesses of the crime. **Shaykhul-Islâm Ibn Taymiyah** (may Allah have mercy on him) maintains that hostility (borne by the suspect to the victim) is not the only factor considered in the case, but there are other aspects that make the accusation likelier to be valid, such as a group of people's departure from a certain place leaving a killed person behind, the testimony of incompetent witnesses...etc.

Imâm Ahmad said:

"I resort to qasâmah if there is some inadequate testimony, if there is a good reason for the accusation, if there is hostility (between the suspect and the victim), or if the suspect is notorious for committing such a murder."[2]

Shaykhul-Islâm Ibn Taymiyah commented on this saying:

"Imâm Ahmad mentioned four reasons (for resorting to qasâmah); the presence of witnesses whose testimony is inadequate due to incompetence, the existence of a good reason for the accusation, such as

a group of people's departure from a certain place leaving the victim behind, the presence of hostility between the suspect and the victim, or the suspect's notoriousness for committing murder. And these are sound reasons."

Ibnul-Qayyim (may Allah have mercy on him) also said:

"These are the best bases of compurgation, as they rely on the apparent signs that support the plaintiff's allegation and, accordingly, it becomes permissible for the plaintiff to take oaths. The judge in this case is entitled, or rather obligated, to entitle the plaintiff- in this case the victim's nearest kinfolk- to retaliation or diyah, even though the judge knows the plaintiff is not an eye witness of the crime."

The victim's kinfolks, however, must not take oaths unless they are nearly certain of their allegation. On the other hand, the judge must preach the victim's kinfolk on the punishment awaiting those who commit perjury.

2- Legal Accountability

Among the conditions for *qasâmah* is that the suspect must be legally accountable; allegation cannot be made against a child or an insane person.

3- Availability

It is a condition that the suspect must be able to have committed the murder. Hence, if the suspect has been far from the crime scene at the time when it has been committed, the allegation is rejected.

The Way *Qasâmah* (Compurgation) is Made

If the previously mentioned conditions are fulfilled, the plaintiffs, the victim's kinfolks, are asked to take fifty oaths that they believe a particular person committed the murder. The share of each of them in the number of oaths should be equal to their share in the victim's inheritance. The accused person must be present during the taking of oaths. If the victim's inheritors abstain from taking the fifty oaths or from completing them, the accused is asked to take fifty oaths that he is innocent, provided that the plaintiffs accept his taking of oaths. If the accused person completes the fifty oaths, then he is deemed innocent. However, if the plaintiffs do not agree to the accused person's taking of oaths, the judge must order the *diyah* to be paid from the Public Treasury. This is because when the *Anṣâr* refused to let the Jews take oaths, as mentioned above, the Messenger of Allah (PBUH) ordered the *diyah*

to be paid from the Public Treasury, as there is no longer any means of proving the guilt of the accused, so that the murder of the innocent victim would not be uncompensated.

Scholars disagree regarding the legal consequence of a valid process of *qasâmah* if its conditions are fulfilled and the guardians of the victim have taken the fifty oaths. However, the sound opinion is that if the conditions of retaliation are fulfilled, the accused person is to be killed in *qiṣâṣ*. This is because the Prophet (PBUH) said:

> *"If fifty men of you take oaths against a man of them (that he is believed to be guilty), he will be delivered to you (to execute retaliation)."*[3]

Hence, taking oaths replaces, or is regarded as, an evidence.

As regards the legal consequence of a valid process of compurgation, the great scholar **Ibnul-Qayyim** said:

> *"Mere allegation is not sufficient for any liabilities to follow. If an allegation is based on presumptions such as notoriety and manifest hostility, the legislator allows this allegation to be supported via the process of taking fifty oaths, for it is most unlikely that fifty men would unjustly accuse an innocent man of murder. The ḥadith that states, "If people are granted (what they claim) on basis of their claim, they would claim the lives and properties of persons, but the oath must be taken by the defendant..."*[4] *does not contradict the oath-taking process whatsoever, but it stresses that a mere claim is not enough for getting the right of retaliation..."*

Scholars have the opinion that if a person dies as a result of over-crowdedness on the *Jumu'ah* (Friday) Prayer or during performing *ṭawâf* (circumambulating the Ka'bah), his *diyah* is to be paid from the Public Treasury. They base their opinion on the following narration: A man had been killed on the Day of 'Arafah (the ninth of Dhul-Ḥijjah) during *Ḥajj* (Pilgrimage) as a result of over-crowdedness. His kinfolks went to Caliph 'Umar Ibnul-Khaṭṭâb and he told them they had to prove who had murdered him. 'Ali Ibn Abû Ṭâlib was present and he said to 'Umar,

> *"O Commander of the Believers! A Muslim's blood must be soon compensated. It is either to find out who murdered him or to pay his diyah from the treasury."*

Endnotes

1 Al-Bukhâri (6142) [10/658] and Muslim (4318) [6/146].
2 See: "*Al-Ikhtiyarât Al-Fiqhiyyah*" [p. 425].
3 Muslim (4319) [6/149].
4 Al-Bukhâri (4552) [8/268] and Muslim (4445) [6/229].

X:PRESCRIBED PUNISHMENTS

CHAPTER

1

Hudûd (Prescribed Punishments)

Hudûd are the prescribed punishments legally decreed to be executed when certain sins are committed in order to forbid recommitting them. The origin of the legality of these prescribed punishments is the Noble Qur'ân, the *Sunnah* (Prophetic Tradition) and the consensus of Muslim scholars.

Shaykhul-Islâm Ibn Taymiyah (may Allah have mercy on him) said:

> *"The prescribed punishments stem from the mercy to all creatures and doing whatever is good for them. Thus, he who executes such punishments should have the intention of doing good and showing mercy to those on whom they are imposed, just like the father who seeks to discipline his son or the doctor who seeks to cure a patient."*[1]

The wisdom behind ordaining the prescribed punishments is that they are means of deterrence, restraint, and purification from sins. They are ordained to fulfill the Rights of Allah, Exalted be He, in the first place, and then for

the benefit of the Muslim community. Allah, Exalted be He, has made these punishments incumbent upon those who commit crimes stemming from weaknesses in human nature. Thus, such prescribed punishments are in the best interest of humankind in this world as well as in the Hereafter. To illustrate, the affairs of any state do not settle except through having restraints, deterrents, and punishments to be imposed on criminals. Through applying these punishments, the disobedient people and outlaws are deterred, the obedient and law-abiding people feel safe, justice is established on earth, and people feel secure with regard to their souls, honors and properties. This can be seen in the societies that apply the punishments prescribed by Allah, where security, stability, and welfare are achieved in a way that none can deny. In contrast to this are the societies that dispense with the punishments prescribed by Allah on the pretext that such punishments are savage and incompatible with modern civilization. Thus, these communities are deprived of this divine justice achieved through these prescribed punishments and the virtues of security and stability they maintain. Whatever arms and high technology such straying communities have, it avails them nothing until they apply the punishments prescribed by Allah for the benefit of His servants. This is because human societies cannot be ruled only by power and technology, but they are to be ruled by the Law of Allah and His prescribed punishments; power and technology can only serve as means to execute these legal punishments, provided they are properly used.

How could those deviating people describe the punishments prescribed by Allah as being savage while in reality they represent divine mercy to all humankind? How could they regard those divine decrees as savage while not regarding the wrongdoing done by criminals as savage, though they, the criminals, horrify safe people, harm the innocent, and disturb social peace and stability? In fact, this is the real savagery; the one who shows mercy toward such criminals is more unjust and more savage than the criminals themselves. So regrettably, when minds are spoiled and morality vanishes, people see what is right wrong and vice versa. In this regard, a poet says,

"For a sore eye, sunlight might look obscure

And for a sore tongue, water might taste impure".

It is impermissible to execute a prescribed punishment on a culprit unless the following two conditions are met:

The first condition: is that the culprit must be a legally accountable person, i.e. sane and adult, for the Prophet (PBUH) said:

"There are three (persons) whose actions are not recorded: A minor until he reaches puberty, a lunatic until he regains his reason, and a sleeper until he awakes."

(Related by the Compilers of *Sunan* and others)

Since none of the acts of worship is obligatory upon such persons, they are more entitled to be exempted from legal punishments, for they are already legally unaccountable persons, in addition to the fact that legal penalties are inapplicable in case of suspicion.

The second condition: is that a culprit must be aware of the prohibition of the act he has committed; otherwise, the prescribed punishment is inapplicable. This is because `Umar Ibnul-Khattâb, `Uthmân Ibn `Affân, and `Ali Ibn Abû Tâlib (may Allah be pleased with them all) maintained:

"No prescribed punishment is to be executed except on him who is aware of it (i.e. aware that his deed entails such a punishment."[2]

That opinion of theirs was not rejected by any of the Companions, and **Al-Muwaffaq Ibn Qudâmah** said, *"This is the opinion of the majority of scholars."*

When these conditions are met by the culprit who commits a crime that incurs a prescribed punishment, then it is to be carried out by the judge (or his deputy). The Prophet (PBUH) used to execute the prescribed punishments and so did the Rightly-guided Caliphs. In addition, it happened that the Prophet (PBUH) appointed a person to execute a prescribed punishment on his behalf, as he (PBUH) once said to Unays (in a certain incident):

"O Unays! Go to the wife of this man and if she confesses (that she has committed adultery), then stone her to death."

Moreover, he (PBUH) ordered that Mâ`iz was to be stoned to death and he (PBUH) did not witness him being stoned[3]. The Prophet (PBUH) also said concerning a thief:

"Take him and cut his hand off..."[4]

As the prescribed punishment needs *ijtihâd*, and because there is a risk of transgressing during its execution, it must be undertaken by the judge or his deputy so as to guarantee complete justice during execution. This should be the way to follow, whether the prescribed punishment concerns violating one of the Rights of Allah, as in the case of *zinâ* (adultery or fornication), or a right of a human being, as in the case of false accusation of *zinâ*.

Sheikh Taqyyud-Dîn Ibn Taymiyah (may Allah have mercy on him) said:

> *"The limits whose violation does not only affect certain people are called 'the Limits of Allah' and 'the Rights of Allah', such as banditry, theft, and zinâ. This also applies to running public properties, endowments, and bequests that are not made to specified people. Such limits are among the most important affairs of any state, so it is the duty of rulers to pursue them and execute the punishments for violating them even if without any claimants, and testimonies are to be accepted even if without any claimants as well. Moreover, the prescribed punishments are to be executed without any distinction between the honorable and the mean, or the mighty and the weak..."*[5]

It is impermissible to execute prescribed punishments in the mosque. Rather, they are to be executed outside it, for Hakîm Ibn Hizâm (may Allah be pleased with him) narrated:

> *"The Messenger of Allah (PBUH) forbade executing qisâs (legal retribution), reciting poetry, or executing prescribed punishments (hudûd) in the mosque."*[6]

The poetry meant in this *hadîth* is the immoral one.

In addition, one is prohibited to intercede to prevent executing a prescribed punishment after it has reached the judge, and it is also prohibited for those in authority to accept any intercession in this concern. This is because the Prophet (PBUH) said:

> *"If anyone's intercession hinders the execution of one of the punishments prescribed by Allah, then he has opposed Allah in what He has ordained."*[7]

Moreover, the Prophet (PBUH) said to the one who wanted to pardon a thief:

> *"Why did you not do that before bringing him to me?"*[8]

Shaykhul-Islâm Ibn Taymiyah (may Allah have mercy on him) said:

> *"It is prohibited to suspend executing a prescribed punishment whether by an intercession, a gift, or anything of the kind. And it is already prohibited to intercede in a crime that entails a prescribed punishment. Whoever stops executing it (i.e. the prescribed punishment) for any of such reasons – though he is able to execute it – upon him is the curse of Allah, the angels, and all mankind, altogether."*[9]

Ibn Taymiyah added:

> *"It is impermissible to get money from a thief, an adulterer, a drunk, a bandit, or the like, to stop executing a prescribed punishment, whether this money is paid to the treasury or to any other person. Such money is deemed ill-gotten and evil, so if the one in authority accepts it, then he is considered to be committing two evil deeds; the first is preventing the execution of a prescribed punishment, and the second is taking ill-gotten money. Thus, such a person (who accepts such a bribe) abandons what is obligatory and does what is prohibited. It is unanimously agreed that the property taken (as a bribe) from an adulterer, a thief, a drunk, a bandit, and their likes, to stop executing a prescribed punishment, is evil and ill-gotten money, and it is among the most evil things that spoil Muslims' affairs. It also causes the violability of the one in authority, his disrespect in the hearts of people, and the diminishment of his power."*[10]

This is because nothing can stop crimes and safeguard the society against their evils but the establishment of the prescribed punishments against perpetrators. However, replacing the legal punishments with mere fines, imprisonment, or suchlike innovated positive punishments, leads only to corruption, injustice, and spread of evil.

Our *faqihs* (scholars of Islamic Jurisprudence) state that the crimes for which executing the prescribed punishments is obligatory are five: *Zinâ* (adultery or fornication), theft, banditry, drinking intoxicants, and false accusation of *zinâ*. As for crimes other than these five, they just entail discretionary punishments, as will be explained later if Allah wills. They also maintain that the severest lashing is that executed as a punishment for fornication, then that for false accusation of *zinâ*, whereas the lashing for drinking intoxicants is less severe, and the least is that executed as a discretionary punishment. This is because Allah, Exalted be He, stresses that the punishment for *zinâ* in particular must be severe; Allah says,

> ***"...and do not be taken by pity for them in the religion [i.e. law] of Allah..."*** (Qur'ân: An-Nûr: 2)

Whatever sin less than fornication in grievousness is to be less with regard to the number of lashes, for no other sin entailing a punishment by lashing is to be graver than fornication.

Furthermore, *faqihs* maintain that if the offender dies during the execution of a prescribed punishment, the executer will be liable for nothing, for he has been carrying out the punishment prescribed by Allah, in the way ordained by Allah, Exalted be He, and enjoined by His Messenger (PBUH). However, if the executer exceeds the legal way of execution that the one being punished dies, the former becomes liable for *diyah*. In this case, the death of the one being punished has been the result of the transgression of the executer, so the case becomes similar to murder rather than a prescribed punishment. Thus, the executer becomes liable to pay the *diyah*; this opinion is maintained by **Al-Muwaffaq** (may Allah have mercy on him) who said, *"We do not know any juristic disagreement on this ruling."*

Endnotes

1 See the footnote in "*Ar-Rawd Al-Murbi*'" [7/300].
2 `Abdur-Razzâq (13644) [7/403], (13648) [7/405], and (13644) [7/403] and Al-Bayhaqî (17065) [8/415].
3 Al-Bukhârî (6815) [12/147] and Muslim (4396) [6/193].
4 An-Nasâ'î (4892) [4/438].
5 See: "*Majmu`ul-Fatâwâ*" (28/297).
6 Abû Dâwûd (4490) [4/407], At-Tirmidhî (1405) [4/19] and Ibn Mâjah (2599) [3/248].
7 Abû Dâwûd (3597) [4/18] and Al-Bayhaqî (17617) [8/576].
8 Abû Dâwûd (4394) [4/360], An-Nasâ'î (4893) [4/438] and Ibn Mâjah (2595) [3/246].
9 See: "*Majmu`ul-Fatâwâ*" (28/298).
10 See: "*Majmu`ul-Fatâwâ*" (28/302).

CHAPTER

2

Prescribed Punishments for *Zinâ*

Faqihs view that the judge or his deputy must witness the execution of the punishment for *zinâ* (adultery or fornication). In addition, the execution must be witnessed by some believers as well, for Allah, Exalted be He, says:

"...***And let a group of the believers witness their punishment.***"

(Qur'ân: An-Nûr: 2)

Zinâ is one of the most grievous crimes, and the cases of *zinâ* differ in the degree of immorality, sinfulness, and ugliness. To illustrate, having sexual intercourse with a married woman, committing incest, and having sexual intercourse with one's neighbor's wife are the most grievous types of *zinâ*.

Moreover, *zinâ* is a major sin as it results in abominable consequences such as lineal disarray and confusion that lead to disconnection and miscommunication among people and to their lack of mutual support in righteousness. It also causes the corruption and destruction of all aspects

of human life. Due to such grievous consequences of *zinâ*, Allah, Exalted be He, has prescribed a severe punishment for adultery, namely stoning to death, or lashing and banishment in case of fornication. Such severe punishments are decreed as means of deterrence and avoidance of the resulting moral and social diseases that afflict society. That is why the Lawgiver of *Sharî`ah* firmly prohibited committing *zinâ*; Allah, Exalted be He, says,

> ***"And do not approach unlawful sexual intercourse. Indeed, it is ever an immorality and is evil as a way."*** (Qur'ân: Al-Isrâ': 32)

Therefore, Allah has prescribed severe punishments for committing the sin of *zinâ*.

Faqîhs define *zinâ* as follows: It is the committing of illegal sexual intercourse in the vagina or the anus. **Ibn Rushd** (Averroës) said:

> *"It is every sexual intercourse that happens in any circumstances other than valid marriage or what may be thought as marriage, or with one's slave girl. This is unanimously agreed upon by Muslim scholars, but they have disagreed on whether what may be thought as marriage can prevent executing the prescribed punishment or not."*[1]

If the perpetrator of illegal sexual intercourse, male or female, is married and legally major (i.e. if the case is adultery), he/she is to be stoned to death. This is the opinion maintained by the men of religious knowledge of the Prophet's Companions, the Successors of the Companions, and those who followed them in the various Islamic states through different eras; none has disagreed on this opinion except the Kharijites[2]. In addition to this, stoning to death as a legal punishment for adultery is stated in the *Sunnah* (Tradition) of the Messenger of Allah (PBUH), and clearly shown through the Prophetic sayings and actions that are recurrently narrated. Stoning the offender to death in case of adultery was also mentioned in the Noble Qur'ân, then it was abrogated in wording but its ruling is still valid. It had been stated in the following verse before it was abrogated: ***"And when an old man (i.e. a married man) or an old woman (i.e. a married woman) commits adultery, inevitably stone each one of them as a deterrent [punishment] from Allah. And Allah is Exalted in Might and Wise."***[3]

Stoning to death in case of adultery is clearly stated in the Qur'ân (through the aforementioned verse that was abrogated in wording but not in ruling), the recurrent *Sunnah*, and the consensus of Muslim scholars. However, the Kharijites as well as some similar modern writers have dared to deny it, following their

own desires and disregarding the prescribed legal rulings and the consensus of Muslim scholars.

The man supposed to be *muhsan*[1] is the one who has already had sexual intercourse with his wife in her vagina, whether she is Muslim or non-Muslim (i.e. a Christian or a Jew), provided both the married couple are adult, sane, and free, not slaves. However, if any of these conditions is not fulfilled in one of the two spouses, then the state of *ihsân* is not fulfilled.

These conditions can be summarized as follows:

1-The sexual intercourse must be done in the vagina.

2-The sexual intercourse must be within a valid marriage.

3-Both of the two spouses must be adult, sane, and free persons.

The married person is singled out for stoning to death because he/she has already got married and become acquainted with abstinence from unlawful sexual intercourse and aware of the way to safeguard oneself against such prohibited sexual affairs. Such a person is supposed to have known how to abstain from committing adultery and consequently from suffering its legal punishment. Thus, there is no excuse for him/her at all, as s/he has been completely favored over single people (through marriage), and whoever is favored by Allah over others his guilt is more grievous, and thus such a person deserves to be punished more severely.

If a legally accountable free person commits fornication while he/she is not in a state of *ihsân* (i.e. not married or previously married), he/she is to be lashed a hundred lashes, as Allah, Exalted be He, says:

> ***"The [unmarried] woman or [unmarried] man found guilty of sexual intercourse – lash each one of them a hundred lashes..."***
>
> (Qur'ân: An-Nûr: 2)

Thus, the prescribed punishment for adultery, which is stoning to death, is inapplicable in case of fornication, when one is not *muhsan*. Rather, the offender of fornication is to be lashed instead of being stoned to death, as his/her case involves a kind of excuse. Thus, the life of a fornicator is spared, yet s/he is to be punished for his/her sin by hurting all his/her body through the severest kind of lashing. Allah, Exalted be He, says:

> ***"...and do not be taken by pity for them in the religion [i.e. law] of Allah..."*** (Qur'ân: An-Nûr: 2)

This means that there should be no mercy toward fornicators concerning the execution of the prescribed punishment, namely lashing. Moreover, Allah, Exalted be He, addresses the executer saying:

> ***"...if you should believe in Allah and the Last Day..."***
> (Qur'ân: An-Nûr: 2)

That is, there should be no mercy in such cases if the executer is a true believer, as faith entails firmness in the religious affairs and exerting all effort to establish their rulings.

It is authentically stated in the *Sunnah* of the Messenger of Allah (PBUH) that a fornicator is to be banished for a year in addition to lashing him/her. That is because it is related by At-Tirmidhî and other compilers of *Hadîth* that:

> *"The Prophet (PBUH) executed the punishment of lashing and banishing (the fornicator), and Abû Bakr executed the punishment of lashing and banishing, and (also) 'Umar executed the punishment of lashing and banishing."*[5]

Moreover, the Prophet (PBUH) said:

> *"When an unmarried male commits fornication with an unmarried female (they should receive) a hundred lashes and banishment for a year."*[6]

If the adulterer is a slave, he is to be lashed fifty lashes, as Allah, Exalted be He, says concerning female slaves:

> ***"...But once they are sheltered in marriage, if they should commit adultery, then for them is half the punishment for free [unmarried] women..."*** (Qur'ân: An-Nisâ': 25)

There is no difference between male and female in this regard. The prescribed punishment mentioned in the Qur'ân is lashing. Stoning to death was also mentioned in the Qur'ân as the prescribed punishment for adultery, yet its wording was abrogated but its ruling is still in force.

The punishment of banishing is not to be executed on slaves, for it harms the interest of their masters. In addition, there is nothing mentioned in the *Sunnah* stating that a slave should be banished in this case. The Prophet (PBUH) said concerning the case of a salve girl who commits fornication while not being in a state of *ihsân*, i.e. not sheltered in marriage:

> *"If she commits fornication, then lash her; if she commits it again, then lash her again; and if she repeats it for (a third time), then lash her for (a third time)..."*[7]

However, he (PBUH) did not mention banishment concerning the fornication of slaves.

The prescribed punishment is not to be executed unless the case is void of suspicion of *zinâ* (adultery or fornication), for the Messenger of Allah (PBUH) said:

> *"Avert punishments in the case of suspicion as much as you can."*[8]

Thus, there is no prescribed punishment applicable to the one who has sexual intercourse in the following cases:

1- If one has sexual intercourse with a woman mistakenly believing that she is his wife

2- If one thinks one's marriage contract is valid while it is not

3- If the validity of one's marriage is controversial

4- If one is unaware of the prohibition of *zinâ* because of being a new convert to Islam or being brought up somewhere away from Islamic states

5- If one is forced to commit *zinâ*

Ibnul-Mundhir said:

> *"All the people of religious knowledge (scholars) from whom we have derived knowledge unanimously agree that the execution of prescribed punishments should be averted in the case of suspicion."*[9]

In fact, this is an aspect of the easiness and leniency of *Sharî'ah* (Islamic Law), as suspicion indicates that the sinner has committed the sin unintentionally. Allah, Exalted be He, says:

> ***"...And there is no blame upon you for that in which you have erred but [only for] what your hearts intended. And ever is Allah Forgiving and Merciful."*** (Qur'ân: Al-Ahzâb: 5)

Among the conditions that obligate executing the prescribed punishment on the offender of *zinâ* is that there must be certainty that s/he has committed it. Such certainty cannot be reached except through two ways:

The first way is that the offender confesses four times that s/he has committed *zinâ*. This is due to the fact that Mâ'iz Ibn Mâlik (may Allah be pleased with him) confessed to the Prophet (PBUH) four times that he had committed it after which the Prophet (PBUH) applied the legal punishment

to him; he (PBUH) kept refraining from punishing him three times, until Mâ`iz confessed for the fourth time. If confessing less than four times had been enough to execute the punishment, the Prophet (PBUH) would have executed it on him at any of the three times of confession.

The confession is not deemed valid unless the offender declares that he/she has committed *zinâ* in plain words. If he/she does not mention the sin of *zinâ* in the confession, then no punishment is applicable, as the offender might mean any prohibited act of lust that does not entail a prescribed punishment, unlike *zinâ*. That is why the Prophet (PBUH) said to Mâ`iz (may Allah be pleased with him) when the latter confessed to the Prophet (PBUH):

> *"Maybe you have only kissed her, winked at her, or looked at her (lustfully)."*[10]

When Mâ`iz insisted he did it, the Prophet (PBUH) kept inquiring until there were no other possibilities.

Moreover, if the offender recants his/her confession before the execution of the punishment, he/she must not be punished. This is illustrated in the way the Prophet (PBUH) continued asking Mâ`iz (and others in other cases) in case the latter takes his confession back. Also, when Mâ`iz tried to escape while being punished and then the people caught him and stoned him to death, the Prophet (PBUH) said:

> *"Why did you not leave him, for he might repent and Allah would accept his repentance?"*[11]

The second way to reach certainty concerning a case of *zinâ* (adultery or fornication) is the presence of four witnesses. Allah, Exalted be He, says:

> ***"Why did they [who slandered] not produce for it four witnesses?..."***
>
> (Qur'ân: An-Nûr: 13)

Allah also says:

> ***"And those who accuse chaste women and then do not produce four witnesses..."*** (Qur'ân: An-Nûr: 4)

Moreover, Allah, Exalted be He, says:

> ***"...bring against them four [witnesses] from among you..."***
>
> (Qur'ân: An-Nisâ': 15)

The conditions for the validity of testimony in the case of *zinâ*:

1- The four witnesses must testify against the adulterer (or the fornicator) at the same place of assembly.

2- They must testify for the same single case of *zinâ*, i.e. their testimony must concern the same specific case of *zinâ* committed by that person.

3- They must describe the committed sexual intercourse in a way that puts aside the possibility of committing any sin other than *zinâ*. This is because some actions preceding the sexual intercourse do not deserve the legal penalty for *zinâ*, such as kissing and foreplay, so the witnesses' testimonies must be made clear to put aside any doubt.

4- The four witnesses must be just men, for neither the testimony of women nor that of wicked, dissolute people is accepted.

5- There must be no defects invalidating the testimony of any of them, such as blindness or the like.

If one of these conditions is not fulfilled, then the prescribed punishment of slandering must be executed upon the witnesses, for in this case they are considered slanderers. Allah, Exalted be He, says:

> ***"And those who accuse chaste women and then do not produce four witnesses – lash them eighty lashes ..."*** (Qur'ân: An-Nûr: 4)

Scholars unanimously agree that *zinâ* can be proven by any of the aforementioned two ways, namely confession and testimony. Yet, they disagree on whether there is a third way that can prove it, namely pregnancy, as in the case when a woman conceives while having neither a husband nor a master (if she is a slave girl). Some of the scholars maintain that this case does not entail a prescribed punishment on the woman, for she may be pregnant due to a doubtful marriage or compulsion. Other scholars believe that this case deserves executing the prescribed punishment as long as the woman does not claim any matter of suspicion concerning her pregnancy.

Shaykhul-Islâm Ibn Taymiyah said:

> *"This ruling – that a pregnant woman who has neither a husband nor a master is to be legally punished – is the one known to have been carried out at the times of the Rightly-guided Caliphs, and it is more consistent with the legal principles. Moreover, it is the opinion maintained by the scholars of Medina; it is based on the fact that uncertain possibilities are disregarded."*[12]

Furthermore, **Ibnul-Qayyim** said:

> *"'Umar Ibnul-Khattâb judged that the woman who becomes pregnant while having neither a husband nor a master is to be stoned to death. This is the opinion adopted by the Mâlikî School, and it is the more valid of the two opinions attributed to Imâm Ahmad, being based on irrefutable evidence, namely the woman's pregnancy."*

Just as the prescribed punishment is to be executed in case of *zinâ* (adultery or fornication) when its conditions are fulfilled, it is to be executed in case of sodomy, namely having anal sex, which is an evil crime and an ugly perversion contradictory to natural disposition. Allah, Exalted be He, said regarding the People of Prophet Lût (Lot) who used to practice sodomy:

> ***"...Do you commit such immorality as no one has preceded you with from among the worlds [i.e. peoples]? Indeed, you approach men with desire, instead of women. Rather, you are a transgressing people."*** (Qur'ân: Al-A'râf: 80-81)

In fact, sodomy is prohibited according to the Noble Qur'ân, the *Sunnah*, and the consensus of scholars. Allah, Exalted be He, describes the People of Prophet Lût as committing an unprecedented immoral act, so such people are deviants in this world. Allah also describes them as being trespassers, transgressors, and criminals. Thus, because of the ugliness of their sin, Allah punished the People of Prophet Lût with a punishment that He had never afflicted any other people with; He turned their town upside down and rained on them stones of hard clay. In addition to this, the Messenger of Allah (PBUH) cursed both the one who practices sodomy and his partner[13]. **Shaykhul-Islâm Ibn Taymiyah** (may Allah have mercy on him) said:

> *"The most valid opinion maintained by the Prophet's Companions is that both those who practice sodomy are to be killed, whether they are muhsans[14] or not." He added: "The Companions of the Prophet have not differed on killing sodomites, and some of them are of the opinion that a sodomite is to be raised to the top of the highest building in town and thrown from there, followed by stones thrown at him."*[15]

Al-Muwaffaq said: *"As the judgment of killing the sodomite is unanimously agreed upon among the Prophet's Companions, they all have acted in accordance with that ruling. Yet, they have differed regarding the way a sodomite is to be killed."*[16]

Moreover, Ibn Rajab said:

> *"The sound opinion is that a sodomite is to be killed, whether he is muhsan or not, for Allah, Exalted be He, says (about the sodomites of the People of Lût), '...**and rained upon them stones of layered hard clay.**'* (Qur'ân: Hûd: 82)"

In this connection, **Imâm Ahmad said**, *"The prescribed punishment for a sodomite is stoning to death, whether he has previously married or not."* This is the same opinion maintained by Imâm Mâlik and others, and it is also one of the two opinions attributed to Imâm Ash-Shâfi`i. This is because the Prophet (PBUH) said:

> *"If you find anyone committing the deed of the People of Lût (i.e. sodomy), kill the one who does it, and the one to whom it is done."*[17]
>
> (Related by Abû Dâwûd)

According to another narration, the Prophet (PBUH) said:

> *"...kill the upper and the lower (i.e. the two partners)."*[18]

Among the acts of sodomy is having anal sexual intercourse with one's wife. Allah, Exalted be He, says:

> ***"...then come to them [i.e. wives] from where Allah has ordained for you. Indeed, Allah loves those who are constantly repentant and loves those who purify themselves."***
>
> (Qur'ân: Al-Baqarah: 222)

Ibn `Abbâs, Mujâhid, and others, maintained that the lawful sexual intercourse meant in the verse is that made through one's wife's vagina; ***"from where Allah has ordained for you."***

In addition, `Ali Ibn Abû Talhah reported that Ibn `Abbâs said:

> *"The verse that reads, '...**then come to them from where Allah has ordained for you...**'* (Qur'ân: Al-Baqarah: 222) *means that you must have sexual intercourse only through the vagina and never exceed it, having it elsewhere; whoever does anything of the kind is regarded as a transgressor."*

Whoever has anal sexual intercourse with his wife must receive a deterrent punishment. If such a person continues committing it, then it is obligatory for his wife to ask for separation from him, for he is such a low, villainous person with whom she must by no means live under such circumstances.

Endnotes

1 See: "*Bidâyat Al-Mujtahid*" (2/529).
2 The Kharijites (Al-Khawârij, i.e. the Seceders): An Islamic radical sect who broke away from the reign of `Alî Ibn Abû Tâlib, the Muslim Caliph then, and murdered him. Their followers believe that the Muslim who commits a major sin is a disbeliever. They also curse and revile the Prophet's Companions and deem the blood of Muslims violable.
3 Ibn Mâjah (2553) [3/225], Al-Bukhârî (6830) [12/176] and Muslim (4394) [6/191].
4 *Muhsan*: One in a state of *ihsân*, i.e. in a state of fortification against illegal sexual intercourse and immorality by virtue of valid (current or previous) marriage.
5 At-Tirmidhî (1442) [4/44] and Al-Bayhaqî (16977) [8/389].
6 Muslim (4890) [6/189].
7 Al-Bukhârî (2153) [4/466] and Muslim (4422) [6/211].
8 At-Tirmidhî (1428) [4/33] and Ibn Mâjah (2545) [3/219].
9 See: "*Al-Ijmâ`*" (p. 162)
10 Al-Bukhârî (6824) [12/165].
11 Abû Dâwûd (4419) [4/373].
12 See: "*Majmû`ul-Fatâwâ*" (28/334).
13 See Ibn `Adiyy in his "*Al-Kâmel*" and Al-Bayhaqî (17017) [8/402] and At-Tirmidhi [4/58].
14 *Muhsan*: One in a state of *ihsân*, i.e. in a state of fortification against illegal sexual intercourse and immorality by virtue of valid (current or previous) marriage.
15 See: "*Majmu`ul-Fatâwâ*" (28/361).
16 See: "*Al-Mughnî*" (10/161).
17 Abû Dâwûd (4462) [4/393], At-Tirmidhi (1460) [4/57] and Ibn Mâjah (2561) [3/229].
18 Ibn Mâjah (2562) [3/229].

CHAPTER

3

Prescribed Punishment for Slander

*Faqīh*s define slander as accusing some person of adultery, fornication, or sodomy. It is a prohibited act according to the Noble Qur'ān, the *Sunnah* and the consensus of Muslim scholars.

Allah, Exalted be He, says:

> ***"And those who accuse chaste women and then do not produce four witnesses – lash them eighty lashes and do not accept from them testimony ever after. And those are the defiantly disobedient."***
>
> (Qur'ān: An-Nūr: 4)

The legal punishment for the slanderer in this world is lashing, the rejection of his testimony, and considering him a defiantly disobedient wicked person as long as he does not prove what he has claimed. As for his punishment in the Hereafter, it is stated in the verse in which Allah, Exalted be He, says:

> ***"Indeed, those who [falsely] accuse chaste, unaware and believing women are cursed in this world and the Hereafter; and they will***

> ***have a great punishment. On a Day when their tongues, their hands and their feet will bear witness against them as to what they used to do. That Day, Allah will pay them in full their true [i.e. deserved] recompense, and they will know that it is Allah Who is the Manifest Truth [i.e. Perfect in Justice]."***
>
> (Qur'ân: An-Nûr: 23-25)

Moreover, the Prophet (PBUH) mentioned slander as one of the enormous, destructive major sins when he said:

> *"Avoid the seven most destructive major sins."*

He (PBUH) pointed out that among those seven destructive major sins was:

> *"...slandering chaste, unaware believing women (i.e. women who are so chaste that they are even unaware of immorality)."*

Furthermore, Muslim scholars unanimously agree on the prohibition of slander, regarding it as one of the major sins.

Allah, Exalted be He, has ordained a deterrent legal punishment for the slanderer. If a legally accountable person falsely accuses a chaste person of committing adultery, fornication, or sodomy, the slanderer is to be lashed eighty lashes, for Allah, Exalted be He, says:

> ***"And those who accuse chaste women and then do not produce four witnesses – lash them eighty lashes..."*** (Qur'ân: An-Nûr: 4)

The verse indicates that if those who accuse chaste modest women do not produce four witnesses to testify to what they have claimed, then they (the accusers) are to be lashed eighty lashes. It does not make any difference whether the accused person is a man or a woman, but women are mentioned in particular because the verse refers to a specific incident, and because slandering women is an uglier and more recurrent deed than slandering men.

This punishment is ordained to be executed on the slanderer in order to preserve the honors of Muslims from profanation, to safeguard innocent chaste people against such offenses and obscenities, and to protect the Muslim community from the spread of sin and corruption.

The *muhsan* person, defaming whom entails the legal punishment for slander, is the one who is free, Muslim, sane, chaste, and able to have sexual intercourse. **Ibn Rushd** (Averroës) said:

"Scholars have unanimously agreed that the slandered person must have the following five characteristics (to regard the case as slander): legal majority, freedom, chastity, Islam, and the ability to have sexual intercourse. If any of these conditions is not fulfilled, the application of the punishment for slander becomes invalid."[1]

Carrying out the punishment for slander is a right belonging only to the slandered person; it is dropped if he forgives the slanderer, and it cannot be executed except upon his request. Thus, if the slandered person pardons the slanderer, the latter is to be exempted from the prescribed punishment. However, the slanderer in this case is to be discretionarily punished to deter him from going on slandering others, which is a prohibited act that incurs the curse and the painful punishment of Allah as stated in the Qur'ân. **Shaykhul-Islâm Ibn Taymiyah** (may Allah have mercy on him) said, *"Scholars unanimously agree that the prescribed punishment for slander is not to be executed except upon the request of the slandered person."*[2]

If someone slanders an absent person, he is not to be punished until the slandered person returns and asks to execute the prescribed punishment or if it is proven that he has asked for it in his absence.

Words of Slander are of Two Types

1- **Plain words:** such words imply nothing but slander, so the slanderer's allegation of intending something other than slander is not acceptable in this case. Slander in direct, plain words includes such expressions as "you adulterer," "you fornicator," or "you sodomite."

2- **Allusive words:** such words imply slander along with other meanings, so the slanderer's claim of intending something other than slander is acceptable in this case. Slander in such allusive, indirect, metonymic words includes such expressions as "you lecher," or "you dissolute," or the like. In the latter case, if the slanderer claims that he means something other than adultery by calling the other person a "dissolute" or a "lecher", his claim is to be accepted and he does not become liable to punishment. This is because his words are allusive and they indicate other meanings, so there should be no punishment according to the legal rule that states, "Legal punishments are averted in the case of suspicion."

If the slanderer accuses a group of people of adultery while they are far above suspicion, or if he slanders the people of a whole town, then no prescribed punishment is to be executed upon him, yet he is to be discretionarily punished. This is because it is certain that such a person is telling a lie, so no shame befalls the accused ones. Still, he is to receive a discretionary punishment to give up such offenses and obscenities that involve a sin entailing punishment, even if none of the accused persons asks for it.

If any one slanders a prophet, he is regarded as a disbeliever, for it is an act of apostasy. **Shaykhul-Islâm Ibn Taymiyah** (may Allah have mercy on him) said, *"Slandering the wives of the Prophet (PBUH) is the same as slandering the Prophet (PBUH) himself; the slanderer is considered an apostate."*[3]

Concerning whether the slanderer's repentance is accepted if he repents before the slandered person is acquainted with the slander, **Shaykul-Islâm Ibn Taymiyah** said,

> *"The sound opinion is that it differs from one person to another due to the differences between people. Most scholars maintain that if the slandered person knows about the slander, then the repentance of the slanderer is not accepted. But if the slandered person does not know, then the slanderer's repentance is accepted, yet he should pray for the slandered person and ask Allah's forgiveness for slandering him..."*[4]

Thus, it has become obvious how a dangerous organ one's tongue is and how grievous what one utters could be. That is why the Prophet (PBUH) rhetorically says:

> *"Is there anything that causes people to be thrown into the Hellfire upon their faces other than the outcome of their tongues (i.e. the verbal sins)?"*[5]

Moreover, Allah, Exalted be He, says:

> ***"He [i.e. man] does not utter any word except that with him is an observer prepared [to record]."*** (Qur'ân: Qâf: 18)

So, one must keep one's tongue away from saying what is prohibited, weigh one's words, and say only what is right and just, for Allah, Exalted be He, says:

> ***"O you who have believed, fear Allah and speak words of appropriate justice."*** (Qur'ân: Al-Ahzâb: 70)

Endnotes

1 See: "*Bidāyat Al-Mujtahid*" (2/539).
2 See: "*Majmû`ul-Fatâwâ*" (32/119).
3 See: "*Majmû`ul-Fatâwâ*" (32/119).
4 See: "*Majmû`ul-Fatâwâ*" (34/541).
5 At-Tirmidhî (2621) [5/11].

CHAPTER

4

Prescribed Punishment for Intoxicants

Every beverage that intoxicates is prohibited according to the Qur'ân, the *Sunnah* and the consensus of Muslim scholars. Allah, the Exalted, says:

> ***"O you who have believed, indeed, intoxicants, gambling, [sacrificing on] stone alters [to other than Allah], and divining arrows are but defilement from the work of Satan, so avoid it that you may be successful. Satan only wants to cause between you animosity and hatred through intoxicants and gambling and to avert you from the remembrance of Allah and from prayer. So will you not desist?"*** (Qur'ân: Al-Mâ'idah: 90-91)

Moreover, the Prophet (PBUH) said:

"Every beverage that intoxicates is prohibited (to drink)."[1]

(Related by Al-Bukhâri, Muslim, and other compilers of *Hadîths*)

In another *hadîth*, he (PBUH) said:

"Every inebriant is an intoxicant, and every intoxicant is prohibited."[2]

Thus, every beverage that intoxicates when taken in large quantities is also prohibited to be taken in small quantities, as it is still called wine after all, whether it is made of grape juice or anything else.

`Umar Ibnul-Khattâb (may Allah be pleased with him) said:

"An intoxicant is that which deranges the mind."[3]

Moreover, **Sheikh Taqiyyud-Dîn Ibn Taymiyah** (may Allah have mercy on him) said:

"Hashish is impure according to the preponderant opinion; it is prohibited whether it intoxicates or not. Hashish that intoxicates is prohibited according to the unanimous agreement of Muslim scholars. Its harm in some aspects is graver than that of wine. It began to appear in the sixth century A.H. (after Hijrah)"[4,5]

Hashish and all other drugs are among the most destructive means that ruin the Muslim youth nowadays. They are considered the most dangerous weapon exported to us by our enemies. They are propagated in our lands by the Jews and their agents so as to destroy Muslims, corrupt their youth, hinder them from benefiting their societies, from striving for their religion, and from defending their nations against transgressors. In such a way, many of the Muslim youth have become narcotized, living either as dependents on their societies or in prisons. These are, regrettably, the consequences of the spread of narcotics and intoxicants in the Islamic countries. There is neither might nor power except in Allah, the Most High, the Most Great.

Intoxicants are by all means prohibited, and drinking is impermissible whatever the case may be; it is impermissible to drink for pleasure, as medication, for quenching thirst, or for any other reason.

As for the prohibition of drinking intoxicants as a means of medication, the Prophet (PBUH) says:

"It is not a remedy; it is a malady."[6]

(Related by Imâm Muslim)

In addition, Ibn Mas`ûd (may Allah be pleased with him) said:

"Allah has never made your remedy in a prohibited thing."[7]

As regards the prohibition of drinking for quenching one's thirst, it is due to the fact that intoxicants do not actually quench thirst, but they rather increase it.

If a Muslim willingly drinks alcoholic liquor or anything mixed with it, such as cologne or suchlike perfumes that contain alcohol, while being aware that it intoxicates, the prescribed punishment for drinking is to be imposed on him, for the Prophet (PBUH) says:

"If anyone drinks an intoxicant, then lash him."[8]

(Related by Abû Dâwûd and other compilers of *Hadîth*)

The prescribed punishment for drinking is eighty lashes. 'Umar Ibnul-Khattâb (may Allah be pleased with him) consulted the people as regards the prescribed punishment for drinking intoxicants. Thereupon, 'Abdur-Rahmân Ibn 'Awf said:

"Make it the same as the lightest prescribed punishment; eighty lashes."

Thus, 'Umar executed it as eighty lashes. Then, he wrote to Khâlid Ibnul-Walîd and Abû 'Ubaydah in Ash-Shâm (the Levant) informing them of that new ruling. (Related by Ad-Dâraqutnî and others)[9]

That incident was witnessed by both the *Muhâjirûn* and the *Ansâr* and none of them disapproved of the new ruling.

Imâm Ibnul-Qayyim (may Allah have mercy on him) said:

"In fact, 'Umar made the prescribed punishment for drinking the same as that of slander (i.e. eighty lashes), and the Companions ratified this judgment."[10]

Moreover, **Shaykhul-Islâm Ibn Taymiyah** (may Allah have mercy on him) said:

"According to the Sunnah and the consensus of Muslim scholars, the prescribed punishment for drinking is forty lashes. Any increase can be decreed by the judge only when necessary, as in the cases when people become addicted to alcohol and they are not deterred except through more lashing."

He also said:

"The sound opinion is that raising the punishment for drinking from forty to eighty lashes is neither completely obligatory nor completely prohibited. Rather, it depends on the discretion of the judge, just

as it is permissible for him to exercise ijtihâd (legal reasoning and discretion) as regards the way of lashing."[11]

The prescribed punishment becomes incumbent upon the confession of the drinker or after the testimony of two just witnesses. Yet, scholars disagree concerning the one who smells of alcohol and whether that proves his guilt or not. Some maintain that the prescribed punishment is inapplicable in this case, and that only a discretionary punishment is to be carried out. Others say that the prescribed punishment is applicable to the one who smells of alcohol unless he claims something that makes the case suspicious. The latter is the opinion reported to have been maintained by Imâm Ahmad. Likewise, it is the opinion of Imâm Mâlik, and it is also the opinion chosen by Sheikh Taqyyud-Dîn Ibn Taymiyah (may Allah have mercy on him). **Shaykhul-Islâm Ibn Taymiyah** said:

"He who has circumstantial evidences proving he is guilty of drinking, like the smell of alcohol, is more deserving to be punished than the one whose guilt is proven by witnesses or confession, as both may be true or false (unlike the smell of alcohol). The Prophet's Companions unanimously agree on this opinion."[12]

Moreover, **Ibnul-Qayyim** (may Allah have mercy on him) said:

"Both 'Umar and Ibn Mas'ûd judged that the prescribed punishment is to be carried out on the person who smells of alcohol, whether he is a man or not. None disagreed on that judgment of 'Umar and Ibn Mas'ûd then."

The danger of intoxicants is really grave. It is the cunning means used by Satan to mislead Muslims. Allah, Exalted be He, says:

"Satan only wants to cause between you animosity and hatred through intoxicants and gambling and to avert you from the remembrance of Allah and from prayer. So will you not desist?"

(Qur'ân: Al-Mâ'idah: 91)

In addition, wine represents the mother of all evils. The Prophet (PBUH) cursed ten persons related to wine, among them are those included in the following *hadîth*:

"Allah has cursed wine, the one who drinks it, the one who serves it, the one who sells it, the one who buys it, the one who presses it, the one for whom it is pressed, the one who conveys it, and the one to whom it is conveyed."[13]

In the narration related by Ibn Mâjah, there is another one added:

"...*and the one who eats up its price.*"

Thus, all Muslims should resist wine firmly and courageously, through blocking its sources and imposing a deterrent punishment on those who drink or promote it. This is because wine leads one to all evils and sins and alienates one from all kinds of goodness. May Allah spare all Muslims its evils and dangers. The Prophet (PBUH) pointed out in a *hadîth* that toward the end of time, some people would deem wine permissible; they would refer to it with other names and would shamelessly drink it[14]. Therefore, Muslims must be on their guard against such wicked people.

Endnotes

1 Al-Bukhâri (242) [1/460] and Muslim (5179) [7/170].
2 Muslim (5189) [7/137].
3 Al-Bukhâri (5581) [10/45] and Muslim (7475) [9/360].
4 *Hijrah*: The Prophet's Immigration to Medina.
5 See Ibn Taymiyah's *Majmû`ul-Fatâwâ* (34/213).
6 Muslim (1984).
7 Al-Bukhârî [74].
8 Abû Dâwûd (4483) [4/404] and An-Nasâ'î (5677) [4/716].
9 Muslim (1706) (35, 36), `Abdur-Razzâq (13542) [7/378], Mâlik (710), Ad-Darâqutnî (3290) [3/112] and Abû Dâwûd (4489) [4/406].
10 See *Zâdul-Ma`âd* [5/44].
11 See Ibn Taymiyah's *Majmû`ul-Fatâwâ* (34/299).
12 Ibn Abû Shaybah (28619) [5/519], `Abdur-Razzâq (17029) [9/228] and Mâlik (709).
13 Abû Dâwûd (3674) [4/55], Ibn Mâjah (3380) [4/64] and At-Tirmidhî (1298) [3/589].
14 Abû Dâwûd (3688) [4/61] and Ibn Mâjah (4020) [4/368].

CHAPTER 5

Discretionary Punishments

From the juristic point of view, a discretionary punishment is a disciplinary one intended to prevent wrongdoing and transgression. It is also a means of honor and respect, for when one is deterred through it and refrains from wrongdoing, one becomes more honorable and respectable.

As for the ruling on the discretionary punishment in Islam, it is obligatory to be carried out for every sin for which there is neither a prescribed punishment nor expiation, whether it is related to doing something prohibited or abandoning something obligatory. A discretionary punishment is to be executed by the judge in case he finds it beneficial to apply it, yet the judge is to give it up if he sees otherwise. Executing discretionary punishments does not need to be requested, so an aggressor is to be discretionarily punished even without the request of the aggressed person; it depends upon the judge's discretion, as crimes differ as regards the degree of enormity and frequency.

The sound opinion is that there is no fixed discretionary punishment, but if the offense is related to a sin that already has a prescribed punishment, like *zinâ* (adultery or fornication) or theft, a discretionary punishment should never reach the amount of the prescribed one.

A discretionary punishment may reach killing if necessary, such as killing a spy, killing one who seeds dissention among Muslims and severs their unity, and killing one who invites people to abide by something other than the Book of Allah, the Qur'ân, and the *Sunnah* (Tradition) of His Messenger (PBUH). Thus, killing as a discretionary punishment is applicable in suchlike cases for which there is no deterrent punishment other than killing.

Shaykhul-Islâm Ibn Taymiyah (may Allah have mercy on him) said:

> *"This is the most just opinion, and it is stated in the Sunnah and the tradition of the Rightly-guided Caliphs. To illustrate, the Prophet (PBUH) ordered that the husband whose wife made her slave girl lawful for him (to have sexual intercourse with) was to be scourged a hundred lashes. Likewise, Abû Bakr As-Siddîq and `Umar Ibnul-Khattâb ordered that the man and the woman who were found in one bed (though not a married couple) were to be beaten a hundred lashes each. Also, `Umar ordered that Sabîgh was to be scourged so severely (as a discretionary punishment)..."*[1]

Shaykhul-Islâm added:

> *"If the intention (behind the discretionary punishment) is to repel corruption that would not be repelled except through killing, then killing is to be executed. Thus, when the offender repeats the same wrongdoing as he has not been deterred by the prescribed punishment, then he is regarded as an assaulting person whose aggression cannot be stopped except through killing, so he is to be killed."*[2]

There is no minimal limit for a discretionary punishment, as crimes differ in the degree of aggression and according to the different circumstances and ages. Thus, some punishments are referred to the discretion of the judge who should decide according to the necessity and the public interest, provided his discretionary punishment accords with what Allah has ordained and avoids what Allah has prohibited.

Just as discretionary punishments may be executed through lashing, they may also be executed through detention, slapping, admonition, banishment, and the like. **Shaykhul-Islâm Ibn Taymiyah** (may Allah have mercy on him) said:

"A discretionary punishment may be administered through reviling the honor of the transgressor by calling him, for example, 'you oppressor' or 'you transgressor,' and dismissing him from the assembly (as a sign of disdain)..."

There is a *hadith* in which the Messenger of Allah (PBUH) says:

"Nobody should be lashed more than ten lashes unless he/she is guilty of a crime that entails a punishment prescribed by Allah."

(Related by Al-Bukhârî and Muslim)[3]

Those scholars who permit making a discretionary punishment more than ten lashes argue that the phrase *"unless he/she is guilty of a crime that entails a punishment prescribed by Allah"* here means "unless he exceeds one of the limits set by Allah", which is acceptable in Arabic. Thus, they argue that the sins that incur more than ten lashes are those related to prohibited matters, and the prohibited matters are the limits set by Allah. Accordingly, a discretionary punishment for a certain crime is to be decided according to the benefit of the punishment and the gravity of the crime.

It is impermissible to cut off one of the parts of the offender's body, to wound him, or to shave his beard as a discretionary punishment, for this causes mutilation and disfigurement. It is also impermissible to apply a discretionary punishment through something unlawful, such as making the offender drink wine as a punishment.

Whoever is notorious for hurting people or damaging their properties is to be jailed until his death or repentance. In this regard, **Imâm Ibnul-Qayyim** (may Allah have mercy on him) said:

"Such a person is to be obligatorily detained. This is the opinion maintained by many Muslim scholars, and it should not be disputable, as it is in the best interests of Muslims and a way of sparing them wrongdoing."

He added:

"Working as a ruler entails firmness, so a ruler should not lack firmness as long as he is acting in accordance with the Shari`ah (Islamic Law). Achieving justice in whatever way is regarded as one of the laws prescribed by Allah. The policy that achieves justice can never be said to contradict the Shari`ah. Not only does it agree with the Shari`ah, but it is also considered one of its integral parts. We call

it a "policy" just to keep up with the modern legal terminology, but it is one of the essential Islamic laws rather than a policy. To illustrate, the Prophet (PBUH) once detained a man who was accused of a crime,[4] *and punished another man who was accused when signs of his guilt appeared. Thus, whoever believes that such persons should be released or freed upon taking an oath, despite their being notorious for corruption and evil, disagrees with the Islamic legal policy. Rather, accused persons should be punished (if signs of their guilt appear) and those in authority should not accept the claims of suspects belied by custom and convention."*[5]

Sheikh Taqiyyud-Dîn (may Allah have mercy on him) said concerning sorcerers and conjurers:

"A discretionary punishment should be applied to those who hold snakes (i.e. snake charmers), those who play tricks with fire, and the like."[6]

A discretionary punishment should also be applied to whoever disparages the Islam of a Muslim or makes fun of his religiousness. Likewise, a discretionary punishment is to be applied to whoever calls a *Dhimmî* "a hajji" and whoever calls the one who visits graves (and idolizes the dead) "a hajji", and the like.

Moreover, if the complainant is proven to be a liar and the accused person to be innocent of the charge alleged by the former, a discretionary punishment is to be imposed on the complainant. He should also be liable for a compensation for the injustice and wrongdoing he has done to the accused person without right.

Endnotes

1 See Ibn Taymiyah's *Majmû`ul-Fatâwâ* (28/344).
2 Ibid.
3 Al-Bukhârî (6848) [12/217] and Muslim (4435) [6/219].
4 Abû Dâwûd (3630) [4/32], At-Tirmidhi (1421) [4/28] and An-Nasâ'î (4891) [4/437].
5 See the footnote in *Ar-Rawḏ Al-Murbi`* [7/351].
6 See the footnote in *Ar-Rawḏ Al-Murbi`* [7/352].

CHAPTER

6

Prescribed Punishment for Stealing

Allah, Exalted be He, says:

> *[As for] the thief, the male and the female, amputate their hands in recompense for what they earned [i.e., committed] as a deterrent [punishment] from Allah. And Allah is Exalted in Might and Wise.* (Qur'ān: Al-Mā'idah: 38)

Moreover, the Prophet (PBUH) says:

> *"The hand should be cut off for stealing something that is worth a quarter of a dinar or more."*[1]

In addition, Muslim scholars have unanimously agreed on the legal necessity of cutting off the hand of the thief in general.

The thief is a corrupt member of society; if left, his corruption would spread in the body of the nation. Thus, he should be restrained by applying the suitable penalty to inhibit him. Therefore, Allah, Exalted be He, has legislated cutting off the hand of the thief; such an unjust hand that reaches out for what is not rightful for it, such a hand that destroys rather than constructs, and takes rather than gives.

Stealing is the act of taking a property stealthily from its owner or his deputy while the thief is subjected to the Laws of Islam and the stolen property has reached the *nisâb*,[2] provided that he has taken the stolen property from a repository for safekeeping objects of the kind. It is also a condition, to regard the case as theft, that the owner of the stolen property is protected by Islam, and that there is no doubt that the offender has no right to take it.

Thus, there are certain qualities that must be fulfilled in the thief, the stolen person, the stolen property and the manner of stealing, and all these qualities are included in the aforementioned definition. Whenever any of these conditions is not fulfilled, the hand should not be cut off. These conditions are:

The act of stealing must be committed stealthily; otherwise, the prescribed punishment of cutting the hand off is not to be executed, as when the property is plundered publicly or is usurped, for in such case the owner of the property can seek help and punish the oppressor and the usurper. With regard to this, **Imâm Ibnul-Qayyim** says:

> *"The penalty of cutting off the hand is to be executed on the thief rather than the plunderer and the usurper, as it is impossible to be guarded against him, for he (the thief) digs out houses, rips open repositories of properties and breaks the seals. So, if cutting off the hand were not legislated, people would steal one another, damage would aggravate, and hardship would grow severer."*[3]

Moreover, the author of the book entitled *Al-Ifsâh* (*Demonstration*) says:

> *"Scholars unanimously agree that for the embezzler, the plunderer and the usurper, despite the gravity of their crime and their sin, no amputation of the hands is to be executed on any of them. It is permissible to prevent their aggression by means of disciplining, punishing, long imprisonment, and deterrent penalty by confiscating their properties."*[4]

Furthermore, to execute the prescribed punishment of amputation, what is stolen must be an inviolable property, for what is not deemed a property is not inviolable, such as the instruments of amusement, intoxicants, the swine

and the dead animals. Also, concerning what is considered a non-inviolable property due to its owner's being a disbelieving warrior against Muslims, no amputation is to be executed. This is because the blood and property of such a person is lawful.

In addition, to execute the punishment of amputation in stealing, the stolen property must not be less than the *nisâb*, which is three Islamic dirhams that equal a quarter of an Islamic dinar. This amount can be estimated by comparing its value to what equals it in other currencies or by estimating the value of the stolen properties according to each age. In regard to this ruling, the Prophet (PBUH) says:

> *"The hand of a thief is not to be cut off but for a quarter of a dinar or more."*[5]
>
> (Related by Ahmad, Muslim and other compilers of *Hadith*)

During the lifetime of the Prophet (PBUH), the value of a quarter of a dinar, which was made of gold, used to equal three dirhams, which were made of silver. There is a clear wisdom in ordaining such amount for the prescribed punishment of amputation, for such amount can mostly suffice a person and those he provides for in a day. Thus, it is worthy of consideration that a hand is to be cut off for stealing a quarter of a dinar though the indemnity paid for cutting it off is five hundred dinars. This is because when it is honest, it is precious; whereas, when it betrays, it becomes worthless. Abul-`Alâ' Al-Ma`arrî, one of the atheist poets, objected to this saying:

A hand whose indemnity is five hundred golden pieces

Wherefore cut off for stealing a quarter of a dinar?

One of the Muslim scholars replied to him saying:

Honesty made it valuable; betrayal made it cheaper

So, mind the Wisdom of the Creator

Among the conditions that must be fulfilled for amputating the hand of the thief is that the stolen property is taken from its repository. The repository of a property is the place where things are usually put for safekeeping, because depositing something indicates safekeeping it. The repository differs according to the kind of property, difference of places, and the ruler's being just or unjust, and his power or weakness. For example, the valuable properties are to be preserved inside houses, stores, and fortified buildings and the like under secure conditions, and so on according to the nature of the preserved property

and the customs of the place. Hence, if a property is stolen from a place which is not considered a repository of such a thing, as when a thief steals from a building whose door is open or from a broken repository, then no amputation is to be executed on him.

There must not be any doubt on the side of the thief. That is, if there is any doubt that may justify the thief stealing, then his hand is not to be cut off, according to the *hadīth* of the Prophet (PBUH) in which he says:

"Avert punishments in the case of suspicion as much as you can."[6]

Thus, the penalty of cutting off the hand is not to be executed in case someone steals from his father's property or from his son's property, as each of them has a right in the property of the other. This constitutes a doubt that averts the execution of the prescribed penalty. Similarly, everyone who is entitled to a right in a property and takes from it, his hand is not to be cut off. However, it is prohibited for such a person to do such an act; thus, he must be punished for doing this and the property he has taken must be returned to its owner.

In addition to the above-mentioned conditions, theft has to be proved by one of two ways. Firstly, two upright men must testify to the theft and describe how stealing has occurred, its repository, the amount stolen and its kind, in order to remove all other doubts and possibilities. Secondly, the thief may confess twice that he has stolen. This is based on the following *hadīth* related by Abū Dāwūd:

> *"A thief who admitted stealing was summoned before the Prophet (PBUH). The Prophet (PBUH) said to him, 'I do not think you have stolen.' He (the thief) replied, 'I did.' The Prophet (PBUH) repeated it twice or thrice (and the man insisted on his confession). Thus, the Prophet (PBUH) ordered that his hand be cut off and it was done."*[7]

The confession made by a thief must include a description of the way he has committed stealing in order to refute the possibility that he might mistakenly believe that his hand must be amputated whereas the case does not entail such a penalty. Moreover, this helps establish whether the conditions of amputating the thief's hand are fulfilled or not.

The person whose property is stolen must reclaim his property. In case he does not, the penalty of cutting off the hand is not to be executed, since property becomes allowable by the permission of its owner. Consequently, if the owner does not demand his property back, then it is possible that he has allowed the accused person to take it, and this constitutes a doubt that averts the execution of the legal penalty.

If the conditions for cutting off the hand are all fulfilled, it is obligatory to amputate the thief's hand. Therefore, his right hand is to be cut off. This is according to the way in which 'Abdullâh Ibn Mas'ûd (may Allah be pleased with him) used to recite the Qur'anic verse ***"...amputate their hands..."*** (Qur'ân: Al-Mâ'idah: 38) as ***"...amputate their right hands..."*** The position of cutting is from the wrist joint, as the hand is the organ one uses in stealing; thus, the thief is punished by destroying such a means. After amputating the hand, the proper treatment should be applied in order to stop the bleeding and cure the wound through the available means of medication. And, Allah, Exalted be He, knows best.

Endnotes

1 Al-Bukhârî (6789) [12/117] and Muslim (4374) [6/181].

2 *Nisâb*: As far as theft is concerned, the *nisâb* refers to the minimum amount of property stealing which entails executing the prescribed punishment, namely cutting off the thief's hand.

3 See *I'lâm Al-Muwaqqi'in* (2/61-63)

4 See the footnote in *Ar-Rawd Al-Murbi'* [7/355].

5 Al-Bukhârî (6790) [12/117], Muslim (4376) [6/182], Abû Dâwûd (4384) [4/355] and An-Nasâ'î (4930) [4/449].

6 At-Tirmidhî (1428) [4/33]; see also Ibn Mâjah (2545) [3/219].

7 Abû Dâwûd (4380) [4/353] An-Nasâ'î (4892) [4/438] and Ibn Mâjah (2597) [3/247].

CHAPTER

7

Prescribed Punishment for Highway Robbery

Allah, Exalted be He, wants Muslims to walk safely through His land, for interchanging benefits, increasing their properties, maintaining good relations with their relatives and helping one another in virtue, righteousness and piety, especially when traveling to the Ka`bah (at Mecca) to perform the rites of Hajj (Pilgrimage) and 'Umrah (Lesser Pilgrimage). Thus, whoever intends to obstruct people's course, or terrorize them on their journeys, Allah has legislated a deterring penalty to eliminate such an obstacle and harm from the way of Muslims. Allah, Exalted be He, says:

> ***"Indeed, the penalty for those who wage war against Allah and His Messenger and strive upon earth [to cause] corruption is none but that they be killed or crucified or that their hands and feet be cut off from opposite sides or that they be exiled from the***

> ***land. That is for them a disgrace in this world; and for them in the Hereafter is a great punishment. Except for those who return [repenting] before you overcome [i.e., apprehend] them. And know that Allah is Forgiving and Merciful."***
>
> (Qur'ân: Al-Mâ'idah: 33-34)

The meant warmongers in the aforementioned noble Qur'anic verse who strive throughout the land causing harm and mischief are the highwaymen, who harass people in the desert or inhabited areas and seize their properties publicly not stealthily.

It is stipulated to execute the prescribed penalty on the highwaymen that what they have seized be tantamount to the *niṣâb* of theft. It is also stipulated that they have stolen from a repository, like seizing the property from the hands of its owner while being in a caravan. Also, the highway robbery must be proved whether through the highwaymen's own confession or through the testimony of two upright men.

The legal punishments highwaymen are to receive differ according to their crimes as follows:

- Whoever kills and seizes people's property is to be killed and crucified until his crime is well-known. Such a person must not be pardoned according to the consensus of Muslim scholars as stated by Ibnul-Mundhir.
- Whoever kills without seizing any property must be killed without being crucified.
- Whoever seizes the property without committing murder, his right hand and his left leg are to be cut off at one time, then the bleeding is to be stopped, and then he is to be released.
- Whoever just terrorizes people on the way without committing murder or seizing any property must be exiled from the land causing him to be homeless. He should not be allowed to stay in any country but should be expelled.

Thus, the punishments the highwaymen receive differ according to the degree of enormity of their crimes. In this respect, Allah, Exalted be He, says:

> ***"Indeed, the penalty for those who wage war against Allah and His Messenger and strive upon earth [to cause] corruption is none but that they be killed or crucified or that their hands and feet be cut off from opposite sides or that they be exiled from the land..."***
>
> (Qur'ân: Al-Mâ'idah: 33)

According to the opinion adopted by the majority of the *Salaf* (early Muslim scholars), this noble verse was revealed regarding the highwaymen, and this is the base on which they founded their judgments. With regard to this, Imâm Ash-Shâfa`î related that Ibn `Abbâs (may Allah be pleased with him) said:

> *"If the highwaymen kill and seize people's properties, they must be killed and crucified. If they kill but do not seize properties, they must be killed without being crucified. Moreover, if they seize properties without killing, their hands and feet are to be cut off from opposite sides. If they only terrorize people on ways without seizing their properties, they are to be exiled from the land."*

If some highwaymen commit murder, the death sentence must be passed on them all. If some of them commit murder and others seize the property, all of them are to be killed and crucified.

If one of such bandits repents before being apprehended, the penalties prescribed concerning his crime, such as exile, amputating a hand and a foot and inevitability of killing, are to be annulled. However, the rights owed to humans must be redeemed, be it a soul, a limb, or a property (as a fulfillment of *qisâs*, i.e., legal retribution), except if the bandit is pardoned by the rightful claimers. This is based on the noble Qur'anic verse in which Allah, Exalted be He, says:

> ***"Except for those who return [repenting] before you overcome [i.e., apprehend] them. And know that Allah is Forgiving and Merciful."*** (Qur'ân: Al-Mâ'idah: 34)

In this respect, **Shaykhul-Islâm, Ibn Taymiyah** (may Allah have mercy on him) said:

> *"Muslim scholars have unanimously agreed that if a highwayman, a thief and their like are brought to justice before the ruler, or the judge, and they repent afterwards, the prescribed penalty imposed on them is not annulled, but it must be executed even if they repent sincerely."*[1]

Thus, the exception of repentance mentioned in the noble verse is only applicable before they are apprehended. So, the one who is penitent after being apprehended is still considered among those on whom the legal penalty must be executed. This is based on the general meaning indicated in the previous noble verse. Moreover, accepting the repentance of the bandit after being apprehended may be used as a means to suspend executing the legal penalties prescribed by Allah. That is, it is easy for the one on whom the penalty must be executed to pretend that he has repented in order to be pardoned for the offenses he has committed.

If anyone is attacked, he has the right to defend himself against the one who wants to kill him, or dishonor him by raping any of his female relatives, such as his mother, his daughter, his sister or his wife, or usurp his property or ruin it. Thus, one has the right to defend oneself in such cases, whether the assailant is a human or an animal. However, one should drive the assailant away by the means one believes the least harmful, because if one were inhibited from defending oneself, one would be harmed either physically or regarding one's honor and property. Besides, if it were not permitted, people would oppress one another. Rather, if the assailant cannot be driven away except by killing, one has the right to kill him without having to pay blood money or being subjected to legal retribution, because one has killed him to ward off his evil.

If the attacked person is killed, he is considered a martyr, based on the *hadith* in which the Prophet (PBUH) says:

> *"If the property of anyone is being taken away without right and he fights (in defense) and is killed, then he is a martyr."*[2]

Imâm Muslim and other compilers of *Hadîth* relate that ABû Hurayrah (may Allah be pleased with him) has narrated:

> *"A man once came to the Messenger of Allah (PBUH)) and said, 'O Messenger of Allah! What if a man comes desiring to seize my property?' He (the Prophet) replied, 'Then do not surrender your property to him.' The man said, 'And what if he fights me?' The Prophet replied, 'Then fight him back.' The man asked again, 'And what if he kills me?' The Prophet (PBUH) answered, 'Then you are a martyr.' The man said, 'And what if I kill him?' He (PBUH) replied, 'He will be cast in the Hellfire.' "*[3]

One must defend oneself and one's honor provided that this does not lead to any sedition, as Allah, Exalted be He, says:

> ***"...And do not throw [yourselves] with your [own] hands into destruction..."*** (Qur'ân: Al-Baqarah: 195)

One should also defend the life and honor of one's Muslim brother, according to the *hadîth* of the Prophet (PBUH) in which he says:

> *"Help your (Muslim) brother, whether he is an oppressor or he is an oppressed one."*[4]

What is meant by helping one's Muslim brother while he is an oppressor is restraining his oppression.

If a thief sneaks into someone's house, he is regarded the same as an assailant; he should be driven away by the means least harmful as possible.

Whoever peeps into someone's house through a crack, a window or from above the roof, the homeowner has the right to drive him away and prevent him from doing so. Moreover, if the homeowner hits such person's eye and gouges it out, then no indemnity is to be paid for such injury. Similarly, if the homeowner stabs such a person with a stick and injures his eye, no compensation is to be paid for it. With regard to this, the Prophet (PBUH) says:

> *"If anyone peeps into the house of some people without their permission and his eye is knocked out, neither diyah (indemnity) nor qiṣâṣ (legal retribution) is due then."*[5]

This is for the sake of guarding the Muslim's inviolability, as well as the inviolability of his property, his honor and his dignity that Allah has endued him with.

This is the justice of Islam and how it secures the safety of the community and the regulation of its interests in order to develop countries, make people feel safe, and regulate the means of transportation between different regions so that people may travel securely by night and day. Indeed, humanity would never gain prosperity save by applying this wise legislation, for all the worldly systems and its material power have failed to achieve even a little of the aspired security without applying this *Sharî'ah* (Islamic Law). Verily, Almighty Allah, the Most Truthful, has spoken the truth when saying:

> ***"Then is it the judgment of [the time of] ignorance they desire? But who is better than Allah in judgment for a people who are certain [in faith]"*** (Qur'ân: Al-Mâ'idah: 50)

Endnotes

1 See Ibn Taymiyah's *Majmû'ul-Fatâwâ* [28/376].
2 Abû Dâwûd (4771) [5/83], At-Tirmidhi (1424) [4/29] and An-Nasâ'î (4100) [4/131].
3 Muslim (358) [1/342].
4 Al-Bukhârî (2443) [5/122] and Muslim (6525) [8/353].
5 See Muslim (5607) [7/363]; see also Al-Bukhârî (6902) [12/303] and Muslim (5608) [7/363].

CHAPTER

8

Fighting the Rebels

Allah, Exalted be He, says:

> *"And if two factions among the believers should fight, then make settlement between the two. But if one of them oppresses the other, then fight against the one that oppresses until it returns to the ordinance of Allah. And if it returns, then make settlement between them in justice and act justly. Indeed, Allah loves those who act justly. The believers are but brothers, so make settlement between your brothers. And fear Allah that you may receive mercy."* (Qur'ân: Al-Hujurât: 9-10)

Thus, Allah, Exalted be He, orders the believers, in this noble Qur'anic verse, to fight the oppressors or the rebels if they do not accept reconciliation. Furthermore, the Prophet (PBUH) says:

"When you (Muslims) are holding to one single man as your leader and someone comes seeking to sow discord among you or disrupt your unity, then you should kill him."[1]

(Related by Imâm Muslim)

Imâm Muslim also related that the Prophet (PBUH) has said:

"If anyone tries to disrupt the affairs of this nation while it is united, you should strike him with the sword whoever he is."[2]

The Prophet's Companions also have unanimously agreed on fighting the rebel.

The word rebellion, in Arabic, indicates oppression, inequity, injustice and deviation from the right path, as the rebels are those notorious for their inequity and injustice, and dissent from the leaders of Muslims, for Muslims must be united as one group under one leadership. Allah, Exalted be He, says:

"And hold firmly to the rope of Allah all together and do not become divided..." (Qur'ân: Âlu 'Imrân: 103)

And He also says:

"O you who have believed, obey Allah and obey the Messenger and those in authority among you..." (Qur'ân: An-Nisâ': 59)

In addition, the Prophet (PBUH) says:

"I enjoin you to fear Allah, and to hear and obey even if a slave is assigned as your leader."[3]

This is considered a necessity, for people are in need of leadership, to preserve the entity of the Muslim community, protect Muslim possessions, execute the prescribed penalties, fulfill due rights, enjoin what is right and forbid what is evil.

In this regard, **Shaykhul-Islâm Ibn Taymiyah** (may Allah have mercy on him) says:

"It must be known that undertaking the responsibility of people's affairs is one of the greatest duties of the religion; rather, neither religion nor life can rise without it. That is, people's interests can never be fulfilled except through the unity of the community. Moreover, any community must have a leader. The Lawgiver of Shari'ah has ordained it in nonessential small gatherings as an exhortation to do the same in other kinds of gathering."[4]

Ibn Taymiyah also says:

> *"It is well-known that people do not thrive except with the presence of rulers, even if those who take over are from the unjust people, for it is better for people to have an unjust ruler than none. It is said that: a year under a despotic leader is better than a night without a ruler."*[5]

Thus, if a group of people who are strong and powerful revolt against the leader on the basis of misinterpretation, aiming to dethrone him or oppose him and to sow the seeds of dissent among people and disrupt their unity, they are considered rebels, who are oppressors and transgressors. In such a case, the leader must send to them asking them about the reason behind their rebellion. If they complain about any act of injustice, he should eliminate it, and if they claim an unclear matter, he should clear it. Allah, Exalted be He, says:

> ***"...then make settlement between the two..."***
>
> (Qur'ân: Al-Hujurât: 9)

Thus, the peacemaking should be implemented in such a way. If what they hold against falls under what is prohibited, he must remove it; however, if it is lawful but they misconceive the matter believing that it is prohibited, he is to clarify the proof of its legitimacy and reveal its truth to them. After that, if they return to the right path and show allegiance, he should leave them, but if they insist on disobedience, he must by law fight against them and his subjects must support him. Allah, Exalted be He, says:

> ***"...Then fight against the one that oppresses until it returns to the ordinance of Allah..."*** (Qur'ân: Al-Hujurât: 9)

Accordingly, fighting the rebels is obligatory in order to ward off their evil and suppress their sedition.

In fighting against rebels, the following matters should be taken into consideration:

First: It is prohibited to use weapons of mass destruction while fighting them, like destructive bombs.

Second: It is prohibited to kill their children, their escapees, their injured, and those who give up fighting among them.

Third: Their captives are to be imprisoned until the rebellion is suppressed.

Forth: Their properties should not be taken as spoils of war, as they still belong to them just like the inviolable properties that belong to other Muslims. Thus, they are impermissible to be looted, as they are still the owners' properties. When fighting comes to an end and the suppression of rebellion is achieved, those rebels who find their properties in the possession of any of those supporters of the ruler have the right to take them back. However, what has been damaged during the war is considered a wasted property entailing no compensation, and there is no *diyah* (blood money) for whoever is killed on both sides.

In this connection, **Az-Zuhri** said:

"A rebellion erupted and was witnessed by many of the Companions of the Messenger of Allah (PBUH). They unanimously agreed that none was to be killed in qiṣâṣ (legal retribution), and no property was to be looted on the basis of a misinterpretation of the Qur'ân, and the property found safe on the spot, after the fight, is to be returned to its owner."[6]

Moreover, it is stated in the book entitled Al-Ifṣâḥ (Demonstration), *They (the Companions) have agreed that there is no compensation for the property spoiled by the just rightful people for the rebels, and vice versa.*

If two Muslim parties are engaged in fighting and none of them is obedient to the ruler, i.e. they fight out of partisanship or craving for leadership, both are considered oppressors. This is because each of them oppresses the other, and none of them is better than the other. Therefore, each is liable for compensation for the damage it may cause to the other. However, if one of them fights by the order of the ruler, it is regarded as the rightful one while the other is the unjust rebellious party as mentioned above.

If a group of people supports the opinion of the Kharijites, considering the Muslim who commits a major sin a disbeliever, cursing and reviling the Prophet's Companions, and deeming the blood of Muslims violable, then they are regarded as followers of the Kharijites and considered as dissolute, vicious and inequitable as them. And if they, in addition to the above, mutiny against the authority of the ruler of Muslims, they must be fought.

Concerning the Kharijites, **Shaykhul-Islâm Ibn Taymiyah** (may Allah have mercy on him) said:

"The Adherents of the Sunnah agree that they are innovators in religion and that they must be fought according to the authentic religious texts. Furthermore, the Companions have agreed on fighting them.

There is no disagreement among the Sunni Scholars that Muslims should confederate with the just rulers who fight against them (i.e. the Kharijites). Yet, there is a disagreement on whether Muslims should confederate with the despotic rulers who fight against the Kharijites or not. It is reported that some scholars agree that it is permissible to ally with unjust rulers in fighting against them, and it is permissible to do the same in fighting against the Dhimmis[7] *who have breached their covenant with Muslims; this is the opinion maintained by the majority of Muslim scholars. They also maintain that it is permissible to fight along with any ruler, whether he is righteous or depraved, so long as his cause is legitimate. That is, if he fights against disbelievers, apostates, covenant-breakers, or the Kharijites, Muslims should fight along with him, yet they should not if the fighting is illegitimate."*[8]

If those who support the belief of the Kharijites do not mutiny against the ruler or sow the seeds of dissention among the Muslim subjects, they should not be fought against, and the Islamic laws are applied to them as Muslims. Yet, they should be discretionarily punished, rebuked, condemned, and prevented from expressing their wicked views and spreading their heresy among the Muslims. This is the opinion of those scholars who do not regard the Kharijites as disbelievers, which is also the opinion of the majority of scholars. However, those who consider them disbelievers maintain that they are to be fought against whatever the case may be.

Endnotes

1 Muslim (4775) [6/444].
2 Muslim (4773) [6/444].
3 Abû Dâwûd (4607) [5/12], At-Tirmidhi (2680) [5/44] and Ibn Mâjah (42) [1/30].
4 See Ibn Taymiyah's *Majmû`ul-Fatâwâ* (28/376).
5 Ibid.
6 See Ibn Abû Shaybah (27954) [5/457]
7 *Dhimmi*: A non-Muslim living in and under the protection of an Islamic state.
8 See Ibn Taymiyah's *Majmû`ul-Fatâwâ* (28/376).

CHAPTER

9

Apostasy

Linguistically, the word "apostasy" in Arabic is derived from "turning back" or "backsliding". So, an apostate is a backslider; Allah, Exalted be He, says:

> ***"...and do not turn back..."*** (Qur'ân: Al-Mâ'idah: 21)

That is, do not backslide.

According to the religious terminology, an apostate is the one who willingly disbelieves after embracing Islam, whether through utterance, belief, doubt, or action.

There are prescribed penalties imposed on the apostate in this world and in the Hereafter. As for his worldly punishment, it is stated in the *hadith* in which the Prophet (PBUH) says:

> *"If anyone (Muslim) changes his religion (i.e. apostatizes), kill him."*[1]

There is consensus among Muslim scholars on this judgment and its relevant rulings, such as separating between the apostate and his wife and preventing him from disposing of his property before killing him.

As regards the prescribed punishment awaiting the apostate in the Hereafter, Allah, Exalted be He, states it in the Qur'anic verse that reads:

> ***"...And whoever of you reverts from his religion [to disbelief] and dies while he is a disbeliever – for those, their deeds have become worthless in this world and the Hereafter, and those are the companions of the Fire; they will abide therein eternally."***
>
> (Qur'ân: Al-Baqarah: 217)

Apostasy takes place by committing one of the breaches of Islam, whether seriously, playfully, or mockingly. Allah, Exalted be He, says:

> ***"And if you ask them, they will surely say, 'We were only conversing and playing.' Say, 'Is it Allah and His verses and His Messenger that you were mocking?' Make no excuse; you have disbelieved [i.e. rejected faith] after your belief..."***
>
> (Qur'ân: At-Tawbah: 65-66)

However, if a Muslim is compelled to utter words of disbelief, he is not regarded as an apostate, as Allah, Exalted be He, says:

> ***"Whoever disbelieves in [i.e. denies] Allah after his belief... except for one who is forced [to renounce his religion] while his heart is secure in faith..."*** (Qur'ân: An-Nahl: 106)

The Breaches of Islam by Which Apostasy Takes Place are Many

The most grievous among them is associating others in worship with Allah, Exalted be He. For example, some people associate others in worship with Allah, such as supplicating the dead, the faithful servants of Allah, and the righteous people, slaughtering sacrificial animals for their graves, vowing to them, or seeking help and support from the dead as grave worshippers do nowadays. So, whoever commits any of such acts of association is considered to have apostatized. Allah, Exalted be He, says:

> ***"Indeed, Allah does not forgive association with Him, but He forgives what is less than that for whom He wills..."***
>
> (Qur'ân: An-Nisâ': 48)

In this connection, **Shaykhul-Islâm Ibn Taymiyah**, said:

> *"Whoever makes mediators between Allah and himself, supplicating them, seeking their aid, and putting his trust in them, has surely disbelieved according to the consensus of Muslim scholars."*[2]

Furthermore, whoever denies some of Allah's messengers or some of the Divine Books has surely apostatized, as he disbelieves Allah and denies one of His messengers or one of His Books. The same applies to whoever denies the angels or the resurrection after death; whoever does this is an apostate, as he thus disbelieves Allah's Book (the Qur'ân), the *Sunnah* (Prophetic Tradition), and the consensus of Muslim scholars. Moreover, whoever disparages or reviles Allah, Exalted be He, or any of His prophets, is considered a disbeliever.

Similarly, whoever claims prophethood, or believes in anyone who claims prophethood after Prophet Muhammad (PBUH), is considered a disbeliever. This is because such people thus deny the Qur'anic verse in which Allah, Exalted be He, says:

> ***"Muhammad is not the father of [any] one of your men, but [he is] the messenger of Allah and seal [i.e. the last] of the prophets..."***
>
> (Qur'ân: Al-Ahzâb: 40)

Moreover, whoever denies the prohibition of adultery (fornication and sodomy), or denies the unlawfulness of any of the consensually and obviously prohibited things, such as eating the flesh of swine, drinking intoxicants, is regarded as an apostate. The same applies to whoever prohibits something consensually and indisputably lawful, such as the lawful slaughter of the animals of grazing livestock.

The same also applies to whoever denies the obligation of any of the prescribed five acts of worship mentioned in the following *hadith* in which the Prophet (PBUH) says:

> *"Islam is built on (the following) five (principles): Testifying that there is no deity but Allah and that Muhammad is the Messenger of Allah, establishing the (compulsory congregational) Prayers dutifully and perfectly, paying the Zakâh, fasting the month of Ramadân, and performing Hajj (Pilgrimage) to the Sacred House of Allah (i.e. the Ka'bah)."*

Whoever denies any of them is deemed an apostate. Additionally, whoever mocks religion, despises the Noble Qur'ân, or alleges that something of the Qur'ân is lost, missing, or concealed, is indisputably regarded as a disbeliever.

Shaykhul-Islâm Ibn Taymiyah (may Allah have mercy on him) said:

"It is religiously taken for granted that, and according to the consensus of Muslim scholars, whosoever vindicates the profession of a religion other than Islam or the Sharî`ah revealed to Prophet Muhammad (PBUH) is a disbeliever and his disbelief resembles those who believe in part of the Scripture and disbelieve in the rest."

He also said:

"And whosoever ridicules the Promise of Allah or His Threat, or does not consider those who profess a religion other than Islam disbelievers, such as the Christians, or doubts their disbelief or maintains the validity of their creed, is consensually regarded as a disbeliever."[3]

Shaykhul-Islâm Ibn Taymiyah added:

"Whoever curses the Prophet's Companions or one of them, and adds to his revilement an allegation that `Alî Ibn Abû Tâlib is a god or a prophet and that Jibrîl (Gabriel) has erred (and revealed the Message to Muhammad instead) is undoubtedly a disbeliever."[4]

Additionally, whoever judges with the positive laws instead of the Islamic *Sharî`ah*, believing that they are more beneficial to people than the latter, or whoever adopts the ideology of communism or Arab nationalism instead of Islam, is undoubtedly an apostate.

There are many types of apostasy. For example, claiming knowledge of the unseen is an act of apostasy, absolving the disbelievers from disbelief, doubting their disbelief, or deeming their creed valid are acts of apostasy, and believing that certain guidance or a certain judgment is more perfect than that of the Prophet (PBUH) is an act of apostasy. In addition, detesting something brought by the Messenger of Allah (PBUH), mocking something related to the religion of the Messenger of Allah (PBUH), and denying a certain reward or punishment stated by him are acts of apostasy. Moreover, supporting the infidels and helping them against Muslims are acts of apostasy. The same applies to those who believe that some people are permitted to deviate from the *Sharî`ah* brought by Prophet Muhammad (PBUH), such as the extremist Sufis; they are regarded as apostates. Likewise, those who turn away from the Religion of Allah, Islam, refraining from learning it or acting according to its teachings are considered apostates. All the aforementioned are among the aspects of apostasy and the breaches of Islam.

Sheikh Muhammad Ibn 'Abdul-Wahhâb (may Allah have mercy on him) said:

> *"There is no distinction regarding all these breaches between committing them jokingly, seriously, or fearfully, save the case when one is forced to commit them. All of them are extremely dangerous and they happen so frequently. Therefore, Muslims must beware of them and be on their guard against them. Verily, we seek refuge with Allah form the acts incurring His wrath and painful torment."*

These are some examples of the breaches of Islam, which exceed by far what is mentioned above. Therefore, Muslims have to learn and know them in order to be on their guard against them and be able to avoid them. This is because if one is not aware of the aspects of associating others in worship with Allah, one becomes apt to commit it. 'Umar Ibnul-Khattâb (may Allah be pleased with him), said:

> *"The knots (i.e. handholds) of Islam are about to be unraveled one after another if there arise in Islam people who know not the Pre-Islamic era."*

So, I advise you, gentle reader, to read Shaykhul-Islâm Ibn Taymiyah's book entitled "*Adherence to the Straightway Requires Opposing the People of the Hellfire*" and Sheikh Muhammad Ibn Abdul-Wahhâb's book entitled "*The Matters in Which the Messenger of Allah Opposed the People of the Pre-Islamic Period of Ignorance*" and its explanation by the great Iraqi Muslim scholar Mahmûd Shukrî Al-Âlûsî, may Allah have mercy on them all.

Whoever apostatizes must be asked to repent and be given a three-day respite; either to repent or to be killed. This is because when 'Umar Ibnul-Khattâb (may Allah be pleased with him) was informed that a man had apostatized after his embracement of Islam and had been killed without being asked for repentance, 'Umar said:

> *"Why have you not imprisoned him for three days, fed him a loaf of bread every day, and asked him to repent? Perhaps he may have repented and reconsidered the Commandment of Allah (i.e. Islam). O Allah! I have not witnessed it, and I would not have approved (of killing the man) if I had been informed."*
>
> (Related by Imâm Mâlik in his collection of *Hadith* entitled *Al-Muwatta'*)[5]

Owing to the fact that apostasy is caused by doubt and is not dispelled at once, a respite must be given to the apostate before killing him that he may meditate and recant. As for the proof of the obligation of killing the apostate if he does not repent, the Prophet (PBUH) says:

"If anyone (Muslim) changes his religion (i.e. apostatizes), kill him."

(Related by Al-Bukhârî and Abû Dâwûd)[6]

The killing of an apostate must be handled by the judge or his deputy, for it is a punishment for violating one of the Rights of Allah, so it is the duty of the one in authority to establish it. The wisdom behind the obligation of killing the apostate is the fact that he has known the Religion of Truth and then abandoned it. Thus, he has become a corrupt person who no longer deserves to live; he has become a corrupted member that may harm the society as well as the Religion of Islam.

Repentance is fulfilled by uttering the Two Testifications of Faith, due to the general meaning of the *hadith* in which the Prophet (PBUH) says:

"I have been commanded (by Allah) to fight the people until they say, 'There is no deity but Allah.' If they say it, they will protect their blood and property from me, except for (violating) Islamic laws (for which they will deserve to be justly punished)."[7]

As for an apostate whose apostasy is based on the denial of one of the fundamentals of Islam, his repentance – along with uttering the Two Testifications of Faith[8] – is fulfilled by his acknowledgment of what he has denied.

An apostate is prevented from disposing of his property due to the dependence of other people's rights on it, just like the property of a bankrupt. Thus, the debts of an apostate, his own expenses, and the expenses of his family are to be managed through his property, throughout the period he is prevented from disposing of it. If the apostate recants and returns to Islam, he retrieves his property and he is enabled to dispose of it once again, as the reason for preventing him from disposing of his property is no longer there. However, if the apostate dies without recantation, or gets killed while still an apostate, his property becomes *fay'* (i.e. spoils gained without fighting or war) belonging to the Muslims' Public Treasury. This is because an apostate is supposed to have no heirs, for he is regarded as a disbeliever, and Muslims do not inherit from disbelievers. In addition, he is not to be inherited by any of the disbelievers, not even those to whose religion he converted, for his apostasy is by no means acknowledged. Furthermore, an apostate inherits from neither a disbeliever nor a Muslim, for the Prophet (PBUH) says:

"A Muslim does not inherit from a disbeliever, nor does a disbeliever inherit from a Muslim."[9]

Muslim scholars (may Allah have mercy on them) have disagreed regarding the judgment pertaining to the acceptance of the repentance of the one who has disparaged or reviled Allah, Exalted be He, or His Messenger (PBUH). Some of them are of the opinion that his repentance is not accepted as regards the worldly rulings and prescribed penalties; he is to be killed and disallowed to inherit or have heirs. They maintain that he is to be killed anyway for the grievousness of his sin, the viciousness of his creed, and his belittlement of Allah, Exalted be He. Another group of scholars believes that his repentance is accepted, for Allah, Exalted be He, says:

> ***"Say to those who have disbelieved [that] if they cease, what has previously occurred will be forgiven for them..."***
>
> (Qur'ân: Al-Anfâl: 38)

Likewise, Muslim scholars (may Allah have mercy on them all) have disagreed regarding the acceptance of the repentance of the one who has recurrently apostatized. Some of them maintain that his repentance is not accepted in this world, and the prescribed penalty pertaining to apostasy must be imposed on him, even if he repents. This opinion is based on the fact that Allah, Exalted be He, says:

> ***"Indeed, those who have believed then disbelieved, then believed, then disbelieved, and then increased in disbelief – never will Allah forgive them, nor will He guide them to a way".***
>
> (Qur'ân: An-Nisâ': 137)

However, another group of scholars believes that his repentance is accepted, basing their opinion on the Qur'anic verse in which Allah, Exalted be He, says:

> ***"Say to those who have disbelieved [that] if they cease, what has previously occurred will be forgiven for them..."***
>
> (Qur'ân: Al-Anfâl: 38)

The aforementioned verse is a general one, and the phrase ***those who have disbelieved*** includes those who have repeatedly apostatized, as apostasy is a kind of disbelief.

Scholars have also disagreed regarding the acceptance of the repentance of a hypocrite, who pretends to be a Muslim and hides disbelief. Some scholars maintain that the repentance of such a person is not accepted, as he cannot show any more signs of his reversion to Islam. Allah, Exalted be He, says:

> ***"Except for those who repent and correct themselves and make evident [what they concealed]..."*** (Qur'ân: Al-Baqarah: 160)

That is to say, if such hypocrites declare repentance and try to show signs of their Islam, it will not surpass their previous state, as they used to show Islam and hide disbelief anyway.

However, some other scholars maintain that the repentance of such hypocrites is accepted, for Allah, Exalted be He, says:

> ***"Indeed, the hypocrites will be in the lowest depths of the Fire - and never will you find for them a helper. Except for those who repent, correct themselves, hold fast to Allah, and are sincere in their religion for Allah, for those will be with the believers. And Allah is going to give the believers a great reward."***
>
> (Qur'ân: An-Nisâ': 145-146)

In addition, the Prophet (PBUH) refrained from punishing the hypocrites due to the signs they showed of their Islam.

Among the sects of atheism and disbelief are those who believe in the *Halûliyyah* (immanentism or pantheism) and the *Ibâhiyyah* (libertinism). Other examples of disbelief are the one who prefers his master (or sheikh) to Prophet Muhammad (PBUH) and the one who believes that if he possesses knowledge, he is exempted from what is divinely ordained or prohibited. The same applies to the one who believes that if he possesses knowledge, he is permitted to profess the creed of the Jews, the Christians, or suchlike sects that have abjured Islam, such as the extremist Sufis and others.

Muslim scholars (may Allah have mercy on them all) have also disagreed concerning the validity of Islam embraced by a discriminating child and the ruling on his apostasy. Some scholars maintain that apostasy of such a discriminating child occurs if he perpetrates any of its forms, because if the Islam of a person is deemed valid, his apostasy is deemed valid as well. Since Islam embraced by a discriminating child is valid, his apostasy is deemed valid, yet such an apostate child is not to be killed until he is asked to repent after he has reached puberty and has been given a three-day respite then. If he repents, his repentance is accepted, but if he does not, he is to be killed.

Moreover, scholars have disagreed regarding the one who abandons the performance of prayer out of negligence despite his acknowledgment of its obligation. The sound opinion in this regard is that such a person is regarded as a disbeliever. This is because the Prophet (PBUH) says:

> *"Between a man and polytheism and disbelief is the negligence of Prayer."*[10]

He (PBUH) also says:

> *"The (only) convention between us and them (i.e. the disbelievers) is Prayer, so whoever neglects it has become unbeliever."*

In addition, Allah, Exalted be He, says:

> ***"[And asking them], 'What put you into Saqar?'[11] They will say, 'We were not of those who prayed...' "***
>
> (Qur'ân: Al-Muddaththir: 42-43)

Allah, Exalted be He, also says:

> ***"But if they repent, establish prayer, and give Zakâh, then they are your brothers in religion..."*** (Qur'ân: At-Tawbah: 11)

The aforementioned noble Qur'anic verse indicates that whoever does not perform prayer is not one of our fellow Muslim brothers, unless he "establishes" prayer, as mentioned in the verse, not only acknowledges its being obligatory. Moreover, the Prophet (PBUH) said:

> *"Islam is built on (the following) five (principles): Testifying that there is no deity but Allah and that Muhammad is the Messenger of Allah,* ***establishing the (compulsory congregational) prayers*** *dutifully and perfectly..."*

The Prophet (PBUH) did not say, "acknowledging the obligation of prayer," but he said, *"establishing prayers."*

Unfortunately, slackness and negligence regarding prayer have become so recurrent nowadays. It is really a serious matter, so those people who are negligent of prayer have to repent to Allah and rescue themselves from Hellfire, as prayer is the basic pillar of Islam that safeguards one against immorality, wrongdoing, and sin.

Endnotes

1 Al-Bukhârî (3017) [6/180], Abû Dâwûd (4351) [4/339], At-Tirmidhî (1462) [4/59], An-Nasâ'î (4070) [4/130] and Ibn Mâjah (2535) [3/214].
2 See the footnote in *Ar-Rawd Al-Murbi'* [7/400].
3 See the footnote in *Ar-Rawd Al-Murbi'* [7/402].
4 See Ibn Taymiyah's *Majmû 'ul-Fatâwâ* (28/376).
5 Mâlik (869) and Ibn Abû Shaybah (32744) [6/444].
6 Al-Bukhârî (3017) [6/180], Abû Dawûd (4351) [4/339], At-Tirmidhi (1462) [4/59], An-Nasâ'î (4070) [4/130] and Ibn Mâjah (2535) [3/214].
7 Muslim (127) [1/156]; see also Al-Bukhâri (1399) [3/331] and Muslim (124) [1/150].
8 The Two Testifications of Faith: Saying, "I testify that there is no deity but Allah and that Muhammad is the Messenger of Allah."
9 Among the rulings relating to apostasy is that the apostate and his (Muslim) wife are to be separated. Yet, if he repents before her waiting period is done, they can reunite in marriage, and if the waiting period is done before he repents, the marriage contract is deemed invalid from the time he apostatized; this applies even if he had apostatized before the marriage was consummated. Al-Bukhâri (6764) [12/61] and Muslim (4116) [6/53].
10 Muslim (243) [1/259].
11 *Saqar*: One of the gates or layers of the Hellfire.

XI:FOOD

CHAPTER

1

Food

Food is the means of nourishment of the human body, and its effect is reflected on man's behavior and conduct; hence, good lawful food has a good effect on the human being, and evil food has an evil effect. For this reason, Allah, Exalted be He, has commanded His servants to eat good lawful food, and has forbidden them from eating what is unlawful. This is illustrated in the following verses:

- Allah, Exalted be He, says:

  "O mankind, eat from whatever is on earth [that is] lawful and good..." (Qur'ân: Al-Baqarah: 168)

- Allah, the Almighty, also says:

  "O you who have believed, eat from the good [i.e., lawful] things which We have provided for you and be grateful to Allah if it is [indeed] Him that you worship." (Qur'ân: Al-Baqarah: 172)

- In addition, Allah, Exalted be He, says:

  "O messengers, eat from the good foods and work righteousness. Indeed, I, of what you do, am Knowing."

  (Qur'ân: Al-Mu'minûn: 51)

- Allah, the Exalted, also says:

  "Say, 'Who has forbidden the adornment of [i.e., from] Allah which He has produced for His servants and the good [lawful] things of provision?' " (Qur'ân: Al-A'râf: 32)

Linguistically, **food** is generally everything that can be eaten or drunk, and all kinds of food are originally lawful according to the general meaning of the noble verse:

"It is He Who created for you all of that which is on the earth..."

(Qur'ân: Al-Baqarah: 29)

In addition to this verse, there are many legal texts in the Qur'ân and the *Sunnah*, which indicate that all kinds of food are originally lawful except what is particularly excluded.

With regard to this, **Shaykhul-Islâm Ibn Taymiyah** says:

> *"The basic rule is that all good kinds of food are lawful for the Muslim who does lawful deeds. That is, Allah, the Almighty, has made lawful the good food for those who make use of it in obeying Him, not in disobedience. As an illustration to this, Allah, Exalted be He, says,* ***'There is not upon those who believe and do righteousness [any] blame concerning what they have eaten [in the past]...'*** (Qur'ân: Al-Mâ'idah: 93) *Therefore, it is impermissible to utilize what is lawful in disobeying Allah. For example, it is not permissible to give meat and bread to someone who drinks alcohol and commits immoralities. Those who eat from the lawful food and do not thank Allah for this blessing, are censured, for Allah, the Almighty, says,* ***'Then you will surely be asked that Day about pleasure.'*** (Qur'ân: Al-Kawthar: 8)"[1]

The verse means that one will be asked on the Day of Judgment whether one has thanked Allah in return for this pleasure or not. Allah, Exalted be He, has allowed the believers to avail themselves of the lawful things as indicated in the following noble verse:

"They ask you, [O Muhammad], what has been made lawful for them. Say, 'Lawful for you are [all] good foods..."

(Qur'ân: Al-Mâ'idah: 4)

Allah has clarified to His servants what He has forbidden them to eat or drink, as He says:

> ***"...He has explained in detail to you what He has forbidden you, excepting that to which you are compelled..."***
>
> (Qur'ân: Al-An`âm: 119)

Thus, any food that is not prohibited by Allah is deemed lawful, as illustrated in the following *hadîth* in which the Prophet (PBUH) says:

> *"Allah, Almighty and Ever-Majestic be He, has made obligations so do not neglect them, and He has set limits so do not transgress them, and He has prohibited things so do not violate them, and He has not made a mention of (other) things (i.e., He has neither decreed them lawful nor prohibited) not out of forgetfulness so do not seek to know them."*[2]

Imâm An-Nawawî (may Allah have mercy on him) commented on this *hadîth* saying, *"This is a hasan (good) hadîth which is related by Ad-Dâraqutnî and other compilers of Hadîth."*

Any kind of food, drink or clothes that is not prohibited by Allah or His Messenger (PBUH) is considered lawful and it is impermissible to prohibit it. That is because Allah, Exalted be He, has defined and explained to us what is prohibited; thus, whatever Allah prohibits is well-explained. As it is impermissible to sanction what is prohibited, it is also impermissible to prohibit what Allah has decreed as lawful and has not mentioned as prohibited.

The rule of thumb in this regard is that any pure and harmless food is lawful, in contrast to the impure food such as the meat of dead animals, blood, droppings, urine, liquor, hashish, and anything defiled with an impure object. All such things are forbidden, as they are all evil and harmful, based on the following verse in which Allah, the Almighty, says:

> ***"Prohibited to you are dead animals, blood, the flesh of swine..."***
>
> (Qur'ân: Al-Mâ'idah: 3)

As for the **dead**, it is the animal that dies without being slaughtered according to the legal way of slaughtering. It is forbidden by reason of being an evil food, as one's purity is surely affected by the kind of food one eats. Prohibiting such kinds of food is one of the virtues of the *Sharî`ah* (Islamic Law). However, if one is compelled to eat such a food, it is lawful for him to do so and the aspect of being impure and evil is nullified under the circumstances

of necessity. This is because the evil impure effect of the evil food is only there when one is willing to accept eating such a kind of food. So, when one is obliged, under the circumstances of necessity, to eat such a food, one's purity is not affected by eating it, as the bad effect only happens when one voluntarily eats such an evil food. Thus, when there is no choice other than eating evil food, there is no harm in eating it.

As for **blood,** it is the blood shed as a result of slaughtering an animal. People of the Pre-Islamic Period of Ignorance (*Al-Jâhiliyyah*) used to put it in the entrails, grill it and eat it. However, whatever blood remaining inside the flesh of the slaughtered animal or in the veins is lawful. Rather, it is not considered impure even if one touches it with the hand or with a piece of cotton for example and it leaves visible traces. In this respect, **Shaykhul-Islâm Ibn Taymiyah** (may Allah have mercy on him) says:

> *"The right opinion is that the blood that is forbidden is the shed, the spilled or the poured blood; however, the blood left in the veins is not deemed prohibited by any of Muslim scholars."*[3]

Moreover, it is prohibited to have any kind of food or drink that causes harm to the body, such as poison, intoxicants, hashish, or tobacco. Allah, Exalted be He, says:

> ***"...And do not throw [yourselves] with your [own] hands into destruction..."*** (Qur'ân: Al-Baqarah: 195)

This noble Qur'anic verse indicates the prohibition of eating or drinking anything that may cause harm. In addition, there are many other legal proofs that emphasize the prohibition of any kind of food or drink that may be harmful either to one's mind or body.

Lawful kinds of food are divided into two kinds: **animals and plants** such as cereals and fruits. Thus, any harmless kind of food is lawful. Animals in turn are divided into two kinds: land animals and sea animals. Land animals are lawful except those types prohibited by the Lawgiver of *Sharî'ah* and they are as follows:

- The domestic donkeys; this is illustrated in the *hadith* narrated by Jâbir (may Allah be pleased with him) who has said:

  "The Prophet (PBUH) forbade (eating) the meat of domestic donkeys and he permitted the (eating of the) meat of horses."[4]

  (Related by Al-Bukhârî and Muslim)

Ibnul-Mundhir says, *"There is no disagreement among Muslim scholars regarding the prohibition of the flesh of domestic donkeys."*[5]

- Land animals that have fangs used for preying are also prohibited, according to the *hadîth* narrated by Abû Tha'labah Al-Khushanî (may Allah be pleased with him) who has said:

  "The Messenger of Allah (PBUH) prohibited eating any of the fanged beasts of prey."[6]

  (Related by Al-Bukhârî and Muslim)

  There is only one exception to this ruling and that is the hyena; it is lawful to eat its meat as indicated in the *hadîth* narrated by Jâbir (may Allah be pleased with him) as:

  "The Messenger of Allah (PBUH) ordered us to eat (the flesh of) hyena."[7]

  In this connection, the great scholar **Ibnul-Qayyim** (may Allah have mercy on him) has said:

  "The animals that are prohibited are those having the two attributes of having fangs and being predators by nature such as lions, wolves, tigers, and leopards. But, as for the hyena, it only has one of these two attributes; it has fangs but it is not a predator beast by nature. The beasts of prey are forbidden to be eaten owing to the predatory nature they possess which is transmitted to the one feeding on them. However, the hyena is not considered a beast of prey by nature whether linguistically or conventionally."[8]

- Birds are generally lawful to be eaten, with the exception of birds with talons used for preying and hunting animals. Examples of such birds are eagles, falcons, and hawks. The prohibition of eating such kinds of birds is illustrated in the *hadîth* narrated by Ibn 'Abbâs (may Allah be pleased with him) who has said,

  "The Messenger of Allah (PBUH) prohibited eating any of the fanged beasts of prey or any of the birds having talons."

  (Related by Abû Dâwûd and other compilers of *Hadîth*)[9]

  Imâm Ibnul-Qayyim (may Allah have mercy on him) says:

  "There are recurrent narrations related about the Prophet (PBUH) indicating that he (PBUH) has prohibited eating animals with fangs, i.e., beasts of prey (or birds with talons). The validity of such traditions is

irrefutable according to the hadîths narrated by 'Alî Ibn Abû Tâlib, Ibn 'Abbâs, Abû Hurayrah and Abû Tha'labah Al-Khushanî (may Allah be pleased with them all)."[10]

- Among the birds that are forbidden to be eaten are those which feed on carrions, like vultures and crows, owing to the evil food they feed on. It is also prohibited to eat the animals that are considered foul, such as snakes, rats, and insects. **Shaykhul-Islâm Ibn Taymiyah** (may Allah have mercy on him) says:

  "It is unanimously agreed upon among Muslim scholars that eating snakes and scorpions is prohibited. Therefore, if any one eats such animals regarding them as lawful to be eaten, he is to be urged to repent (for denying an agreed upon legal ruling), and whoever regards them as prohibited foods but eats them is considered sinful and defiantly disobedient to Allah and His Messenger (PBUH)."[11]

- As mentioned above, it is prohibited to eat insects, as they are injurious.

Among the animals that are prohibited is whatever is born as a result of copulation between an animal that is lawful to be eaten and another animal prohibited to be eaten, such as the mule, which is the offspring of a horse and a domestic donkey. The reason behind prohibiting the eating of such an animal is giving priority to the aspect of prohibition over that of lawfulness.

Some Muslim scholars have classified the land animals prohibited to be eaten in six types:

1) Animals particularly stated in the Qur'ân and *Sunnah* such as the domestic donkeys
2) Animals restricted by certain characteristics and criteria, like the fanged beasts of prey and the birds with talons
3) Whatever feeds on carrions, like vultures and crows
4) Whatever is pernicious and injurious, like rats and snakes
5) Whatever is born as a result of copulation between two animals, one of which is lawful to be eaten and the other is prohibited, like the mule
6) Whatever the Lawgiver of *Sharî'ah* has ordered us to kill, like the five pernicious animals (i.e., the rat, the snake, the scorpion, the rabid dog, and the kite), and what He, the Almighty, has forbidden us from killing, like the hoopoe, and the shrike.

All other animals and birds that are not included under the above-mentioned categories are considered lawful according to the rule stating that any thing is deemed lawful until proved otherwise. The examples of such animals are horses, animals of grazing livestock, poultry, zebras, antelopes, ostriches, rabbits and other wild animals. All these animals are considered good food, so they are included under the meaning of the Qur'anic verse in which, Allah, Exalted be He, says:

"...and makes lawful for them the good things"

(Qur'ân: Al-A`râf: 157)

The *jallâlah*[12] of cows and camels are excluded from being of lawful food. Imâm Ahmad, Abû Dâwûd and other compilers of *Hadîth* have related that Ibn `Umar (may Allah be pleased with him) has said:

"The Messenger of Allah (PBUH) forbade eating jallâlah or (drinking) its milk."[13]

It is also related on the authority of `Amr Ibn Shu`ayb that the Messenger of Allah (PBUH) forbade eating the meat of domestic donkeys and (forbade) riding *jallâlah* or eating its meat[14]. It does not make any difference whether the *jallâlah* is from the animals of grazing livestock, poultry or other animals. Moreover, its milk and eggs are also considered impure until the animal is detained for three days[15] and fed on pure fodder only. In this regard, **Ibnul-Qayyim** says:

"Muslim scholars have unanimously agreed that if the animal is fed on impure fodder, then detained and fed on pure food, its meat and milk become lawful. Likewise, if plants and fruits are watered with impure water, then watered with pure water, they are deemed lawful. Thus, they are no longer deemed impure food because they have been converted to good and lawful food by means of pure water."[16]

Eating onion, garlic and suchlike foods with a bad smell is detestable, especially when attending mosques, as illustrated in the *hadîth* in which the Prophet (PBUH) says:

"Whoever eats from this plant (i.e., garlic) should not enter our mosque."[17]

If any one is compelled by necessity to eat a prohibited food other than poison food, lest he should perish, it is deemed lawful for him to eat only the amount that will support him and keep him alive. The proof of this is shown in the noble verse in which Allah, Exalted be He, says:

"...But whoever is forced [by necessity], neither desiring [it] nor transgressing [its limit], there is no sin upon him..."

(Qur'ân: Al-Baqarah: 173)

Also, if anyone is compelled to eat from the food of others, provided that the owner of such a food does not face the same circumstances of compulsion, the former must be offered whatever may keep him alive in return for paying the price of the food. Furthermore, **Shaykhul-Islâm Ibn Taymiyah** (may Allah have mercy on him) says:

"If the person in need of the food is poor, then he does not have to pay compensation in return for food, for feeding the hungry and clothing the naked is a collective duty, and it becomes an individual duty[18] *on the person other than whom no one can undertake such a duty."*[19]

Moreover, if someone is compelled to use the properties of others without consuming such property, like using clothes to protect the body from coldness, a rope or a bucket to obtain water, or a cooking pot, he must be given such things at no cost, provided that the owner is not in need of them. This is because Allah, the Almighty, has dispraised withholding such things from the poor in the Qur'anic verse:

"And withhold [simple] assistance." (Qur'ân: Al-Mâ'ûn: 7)

Commenting on this noble verse, Ibn 'Abbâs, Ibn Mas'ûd and others said:

"This verse refers to the utensils people share and borrow among themselves such as axes, pots, buckets and the like."[20]

It is permissible for a passerby to eat from the fruits of a garden that has neither a fence nor a guard, whether the fruits are still on the trees or have fallen to the ground. However, one has no right to carry anything of it. This is the opinion adopted by Ibn 'Abbâs, Anas Ibn Mâlik and others. Yet, one is not to climb a tree, nor aim at it with a thing, nor eat from collected fruits, except in case of necessity.

In short, a person passing by a garden is allowed to eat form its fruits provided that the following conditions are fulfilled:

First: It must have neither a fence nor a guard.

Second: The fruits must be either still on the trees or fallen to the ground but not collected.

Third: He must not climb a tree, but just pick the fruits without ascending.

Fourth: He must carry nothing of it with him.

Fifth: He must be in need of such food as stipulated by the majority of Muslim scholars.

Accordingly, if any of the above-mentioned conditions is not fulfilled, one is not permitted to eat from such a garden.

A Muslim should host a Muslim traveling through villages, for a day and a night. However, in towns providing accommodation, it is not obligatory because restaurants and hotels can be found therein, so the traveler is not in need of being hosted, in contrast to the case in villages and deserts. Hosting a Muslim passenger is a duty according to the *hadith* in which the Prophet (PBUH) says:

> *"Whoever believes in Allah and the Last Day should serve his guest generously by giving him his reward." They (the Companions) asked, "What is his reward, O Messenger of Allah?" He (PBUH) said, "(To be entertained generously) for a day and a night."*
>
> (Related by Al-Bukhârî and Muslim)[21]

The *hadith* proves that hosting a passenger is a duty as indicated in the phrase "*Whoever believes in Allah...*, which indicates that one's true faith is dependent on showing hospitality to one's guest. It was also related in the Two *Sahihs*[22] that the Messenger of Allah (PBUH) said:

> *"If you stay with some people and they entertain you as they should do for a guest, accept their hospitality, but if they do not, take from them the right of the guest they should offer."*[23]

The story of Allah's Prophet Ibrâhîm (Abraham) (PBUH) with his guests, which shows how he entertained them with a calf, indicates that hospitality is a characteristic of the religion of the Prophet Ibrâhîm (PUBH). It also shows that one should offer the guests more than what one usually eats. This is one of the virtues and noble merits of this religion which remained throughout Ibrâhîm's offspring until Islam came, stressed them and urged Muslims to adhere to them. Moreover, Islam has entitled the wayfarer a right among the ten due rights mentioned in the noble Qur'anic verse in which Allah, the Almighty, says:

> ***"Worship Allah and associate nothing with Him, and to parents do good, and to relatives, orphans, the needy, the near neighbor, the neighbor farther away, the companion at your side, the traveler..."***
>
> (Qur'ân: An-Nisâ': 36)

Allah, the Exalted, also says:

> ***"So give the relative his right, as well as the needy and the traveler..."***
> (Qur'ân: Ar-Rûm: 38)

The religion of Islam has also assigned a right in the *Zakâh*, among the eight categories that are entitled to receive the *Zakâh*, to be paid to the wayfarer. The wayfarer meant here is the traveler who cannot afford to continue on his journey or return home.

All praises be to Allah for this perfect religion and that wise and Divine Law which is granted to Muslims as a guidance and mercy.

Endnotes

1 See Ibn Taymiyah's *Majmû`ul-Fatâwâ* (7/44) and *Al-Ikhtiyârât Al-Fiqhiyyah* p. 464.
2 Ad-Darâqutnî (4350) [4/109] and Al-Bayhaqî (19726) [10/21].
3 See the footnote in *Ar-Rawd Al-Murbi`* [7/417].
4 Al-Bukhârî (4219) [7/601] and Muslim (4997) [7/95].
5 See the footnote in *Ar-Rawd Al-Murbi`* [7/418].
6 Al-Bukhârî (5530) [9/812] and Muslim (4967) [7/84].
7 See At-Tirmidhî (1796) [4/252].
8 See *I`lâm Al-Muwaqqi`în* (2/126), (4/ 240,380).
9 Muslim (4970) [7/85], Abû Dâwûd (3803) [4/103] and Ibn Mâjah (3234) [3/582].
10 See *I`lâm Al-Muwaqqi`în* (2/118), (4/380).
11 See Ibn Taymiyah's *Majmû`ul-Fatâwâ* (11/690).
12 *Jallâlah*: A term referring to animals that eat impurities.
13 At-Tirmidhî (1829) [4/270] and Ibn Mâjah (3189) [3/560]; see also Abû Dâwûd (3811) [4/106] and An-Nasâ'î (4459) [4/275].
14 Abû Dâwûd (3811) [4/106] and An-Nasâ'î (4459) [4/275]
15 The criterion in this regard is being sure that the animal's blood and flesh have become pure after feeding on pure food; thus, the period may differ from an animal to another according to its body.
16 See *I`lâm Al-Muwaqqi`în* (1/40).
17 Muslim (1251) [3/51].
18 Individual duty: A religious duty whose obligation extends to every Muslim.
19 See *Al-Ikhtiyârât* (p. 465).
20 See Ibn Abû Shaybah (10619) [2/420] and Al-Bayhaqî (7792) [4/308]; see also Abû Dâwûd (1657) [2/206], Ibn Abû Shaybah (10617) [2/402] and Al-Bayhaqî (7789) [4/308].
21 Al-Bukhârî (6019) [10/547] and Muslim (4488) [6/256].
22 The Two *Sahihs*: The Two Authentic Books of Al-Bukhârî and Muslim.
23 Al-Bukhârî (2461) [5/134] and Muslim (4491) [6/257].

CHAPTER

2

Slaughtering

Slaughtering land animals according to the rules of the *Sharī'ah* (Islamic Law) is a prerequisite to make an animal's meat lawful to be eaten; otherwise, it will be considered a dead animal whose meat is prohibited. For this reason, studying the rules of slaughtering and whatever is related to it has become of great importance.

*Faqīh*s (may Allah have mercy on them) have defined slaughtering as: slaying a land animal lawful to be eaten by cutting its throat and esophagus, or wounding the animal that cannot be slaughtered, for being wild for instance. Allah, the Exalted, says:

> ***"Prohibited to you are dead animals, blood, the flesh of swine, and that which has been dedicated to other than Allah, and [those animals] killed by strangling or by a violent blow or by a headlong fall or by the goring of horns, and those from which a wild animal has eaten, except what you [are able to] slaughter [before its death]..."*** (Qur'ān: Al-Mā'idah: 3)

That is to say, the animal that can be slaughtered before it dies is deemed lawful. It does not matter whether the act of slaughtering is a second step after first injuring the animal or it is the first step.

Slaughtering is obligatory and the meat of the animal is not considered lawful unless it is slaughtered according to the rulings of *Sharî`ah*. Therefore, the animal that is not slaughtered in such a way is considered dead and there is a consensus among Muslim scholars that the dead animals' meat is prohibited to be eaten except in case of necessity. Allah, the Exalted, says:

"Prohibited to you are dead animals..."

(Qur'ân: Al-Mâ'idah: 3)

Locusts, fish, and all sea animals are lawful to be eaten without slaughtering, for the dead animals of the sea are lawful. This is based on the *hadîth* narrated by Ibn `Umar who narrated that the Messenger of Allah (PBUH) said:

"Two dead (animals) and two (organs containing) blood have been made lawful to us (Muslims). The two dead (animals) are the whale and the locust, and the two (organs containing) blood are the liver and the spleen."

(Related by Imâm Ahmad and other compilers of *Hadîth*)[1].

The Prophet (PBUH) also said regarding sea animals:

"It (the sea) is that whose water is pure and whose dead animals (the fish) are lawful (to eat)."[2]

There are Four Conditions for Lawful Slaughtering

The First Condition: The slaughterer must be legally competent. That is, the one who performs slaughtering must be sane, professing a heavenly religion, i.e., a Muslim or a person belonging to the People of the Scripture. Thus, whatever is slaughtered by an insane, a drunk or a child under the age of discretion, is judged as unlawful, due to the invalidity of the intention of slaughtering from any of such persons for their lack of discretion. It is also unlawful to eat what is slaughtered by an idolater, a Magus, an apostate, or the one who resorts to graveyards and seeks the help of the dead, because it is considered a sort of major polytheism.

Nevertheless, the slaughtering done by disbelievers, who belong to the People of the Scripture, Jews and Christians, is deemed lawful. In this regard, Allah, Exalted be He, says:

"...and the food of those who were given the Scripture is lawful for you ..." (Qur'ân: Al-Mâ'idah: 5)

That is to say, Allah has allowed us, Muslims, to eat whatever is slaughtered by a Jew or a Christian. It is worth mentioning that there is a consensus among Muslim scholars regarding this matter. Imâm Al-Bukhâri (may Allah have mercy on him) related that Ibn 'Abbâs (may Allah be pleased with him) said:

"The food meant in the verse is their slaughtered animals."[3]

It is also indicated in the meaning of the aforementioned verse that it is unlawful to eat what is slaughtered by a disbeliever who does not belong to the People of the Scripture, which is an unanimously agreed upon opinion.

It is permitted to eat the animals slaughtered by the disbeliever who belongs to the People of the Scripture in contrast to those slaughtered by other disbelievers. This is because the People of the Scripture, Jews and Christians, believe in the prohibition of slaughtering animals for other than Allah and also believe in the prohibition of dead animals, based on the teachings of their Prophets. Contrarily, other disbelievers may slaughter animals for the sake of idols and regard the dead animals as lawful.

The Second Condition: Availability of a tool for slaughtering. Slaughtering is permitted with any sharp-edged tool that causes blood to gush. This tool may be made of iron, stone or other materials. However, it is unlawful to slaughter an animal using a tooth or a claw as a tool. This is according to the *hadîth* in which the Prophet (PBUH) said:

"If the slaughtering tool causes blood to gush and if the Name of Allah is mentioned, eat (of the slaughtered animal); but do not slaughter using a tooth or a nail."

(Related by Al-Bukhâri and Muslim)[4]

With regard to this *hadîth*, **Imâm Ibnul-Qayyim** (may Allah have mercy on him) says:

"The hadîth warns us not to slaughter using a bone, either because some bones may be impure, or because slaughtering with a bone defiles it and thus the believers among the jinn cannot make use of it[5]. The hadîth also confirms this as he (PBUH) said after that, '...I will tell you why: As for the tooth, it is a bone, and as for the nail, it is the knife used by the Ethiopians.' The hadîth declares that it is not lawful to slaughter using the tooth as it is a bone, and that it

is unlawful to slaughter using nails as they were used as knives for slaughtering by the Ethiopians (who were disbelievers)."[6]

The Third Condition: Cutting the throat which is the respiratory track, the esophagus, which is the passage of food and drink, and one of the two jugular veins. **Shaykhul-Islâm Ibn Taymiyah** (may Allah have mercy on him) says:

"In slaughtering, the esophagus, the throat and the two jugular veins have to be cut. Yet, according to the soundest opinion, cutting three out of these four still makes the slaughtering lawful, whether the throat is one of these three parts or not, for cutting the two jugular veins is more efficient than cutting the throat and more sufficient to cause the blood to gush."[7]

Concerning the way of slaughtering camels, it is an act of the *Sunnah* (Prophetic Tradition) to stab the camel by an edged tool at the upper part of its chest, whereas other animals are slaughtered by cutting the throat. The reason behind specifying such particular parts in the body of the animal to be cut while slaughtering is to ensure the blood gushes out. Such spots are the junction of veins. Therefore, this will make the slaughtering faster, the meat more delicious, and this will cause less pain to the slaughtered animal. The Prophet (PBUH) says:

"When you slaughter, slaughter in a good way."[8]

With regard to those animals that the slaughterer cannot manage to slaughter at the aforementioned spots, as in game, wild cattle, animals falling into a well and the like, they can be slaughtered by injuring the animal at any spot of its body and this will be enough for slaughtering the animal according to the *Sharî'ah*. This is illustrated in the *hadîth* narrated by Râfi' (may Allah be pleased with him) that says:

"...One of the camels once ran away, so a man shot it with an arrow that stopped it. Thereupon, the Messenger of Allah (PBUH) said, 'If any animal runs away from you, treat it in this way (i.e., shoot it with an arrow).' "[9]

(Related by Al-Bukhârî and Muslim)

Other *hadîths* indicting the same meaning have been narrated on the authority of 'Alî Ibn Abû Tâlib, Ibn Mas'ûd, Ibn 'Umar, Ibn 'Abbâs and 'Â'ishah (may Allah be pleased with them all)[10].

The animals injured by strangling, by a violent blow, by a headlong fall, or by the goring of horns, and those from which a wild animal has eaten, can be lawful provided that the animal is caught while still alive and slaughtered before it dies. This is based on a noble verse:

> ***"Prohibited to you are dead animals, blood, the flesh of swine, and that which has been dedicated to other than Allah, and [those animals] killed by strangling or by a violent blow or by a headlong fall or by the goring of horns, and those from which a wild animal has eaten, except what you [are able to] slaughter [before its death]..."*** (Qur'ân: Al-Mâ'idah: 3)

That is, when the animal is slaughtered before it dies, it is deemed lawful to be eaten.

- **The animal killed by strangling** is the animal strangled by a rope or the like wrapped around its neck.
- **The animal killed by violent blow** is the animal that is stricken by a violent blow causing it to die.
- **The animal killed by a headlong fall** is the animal that has fallen from a height.
- **The animal killed by the goring of horns** is the animal that is butted by another animal and consequently dies.
- **The animal from which a wild animal has eaten** is the animal that is hunted and killed by a wild beast such as the wolf and the like.

In consideration of the lawfulness of slaughtering such previously mentioned kinds, **Shaykhl-Islâm Ibn Taymiyah** (may Allah have mercy on him) says:

> *"...If such an animal is slaughtered and the normal red blood, which is not the blood of a dead animal, gushed out of it, then it is deemed lawful to eat its meat, even if the animal does not move its forelimb or hind limb or blink or wave its tail or the like*[11].

The Fourth Condition: The slaughterer must say *tasmiyah*[12] while his hand is doing the act of slaughtering, as Allah, the Almighty, says:

> ***"And do not eat of that upon which the Name of Allah has not been mentioned, for indeed, it is grave disobedience..."***
>
> (Qur'ân: Al-An'âm: 121)

Imâm Ibnul-Qayyim says:

> *"There is no doubt that uttering the Name of Allah while slaughtering the animal purifies it and drives Satan away from the slaughterer and the slaughtered animal. On the contrary, if this condition is violated, Satan will beset the slaughterer and the slaughtered animal and will cause foulness to the animal. The Prophet (PBUH) used to mention the Name of Allah when slaughtering. Moreover, the aforementioned noble verse indicates that the slaughtered animal is not lawful to be eaten if the Name of Allah is not mentioned when slaughtering it, even if the slaughterer is a Muslim."*[13]

In addition, it is considered an act of the *Sunnah* to say *takbîr* (saying, "*Allâhu-Akbar*" (i.e. Allah is the Greatest)) along with mentioning the Name of Allah.

Proprieties of Slaughtering

- It is detestable to slaughter with a blunt tool, as illustrated in the *hadîth* of the Prophet (PBUH) in which he says:

  "Every one of you should sharpen his knife, and let the slaughtered animal die without causing it suffering."[14]

- It is detestable to sharpen the knife, the slaughtering tool while being seen by the animal. This is based on the *hadîth* related by Imâm Ahmad as the Messenger of Allah (PBUH) ordered that knives should be sharpened and that they (knives) should be hidden from the animals[15].

- It is detestable to turn the animal to a direction other than that of the *qiblah*[16].

- It is detestable to break the animal's neck or skin it before its body becomes cool.

It is an act of the *Sunnah* to slaughter the camel while it is in the standing position and its left forelimb is shackled; and to slaughter the cow or the sheep while it is lying down on its left side. And Allah knows best.

Endnotes

1 Ahmad (5723) [2/97] and Ibn Mâjah (3218) [3/576].
2 Abû Dâwûd (83) [1/52], At-Tirmidhî (69) [1/100], An-Nasâ'i (59) [1/53] and Ibn Mâjah (386) [1/236].
3 See Al-Bukhâri [9/787].
4 Al-Bukhâri (2488) [5/162] and Muslim (5065) [7/124].
5 Bones are the food of the believers of the jinn as stated in other Prophetic *hadiths*.
6 See *I'lâm Al-Muwaqqi'in* (4/162).
7 See *Al-Ikhtiyârât* (468).
8 Muslim (1955).
9 Al-Bukhâri (5065) [7/124] and Muslim (3075) [6/226].
10 See Al-Bukhâri [9/789].
11 See *Al-Ikhtiyârât* p. 468.
12 *Tasmiyah*: Saying "*Bismillâh*" (i.e., In the Name of Allah).
13 See the footnote of *Ar-Rawd Al-Murbi'* [7/450].
14 Muslim (1955).
15 Ahmad (5864) [2/108] and Ibn Mâjah (3172) [3/554]
16 The *qiblah*: The direction of prayer, namely towards the Ka'bah.

CHAPTER

3

Hunting

Hunting means chasing and killing a lawful wild animal that cannot be grasped easily for slaughtering.

The Islamic ruling pertaining to hunting dictates that it is lawful to hunt an animal for food; however, if it is done only for fun or sport, then it is detestable. Likewise, it is considered prohibited if any harm is caused to people's properties or farms as a result of hunting. The legal evidence of its legitimacy in cases other than the last one is as follows:

Allah, Exalted be He, says:

> ***"...But when you come out of iḥrâm, then [you may] hunt..."***
>
> (Qur'ân: Al-Mâ'idah: 2)

He, the Almighty, also says:

> ***"...and [game caught by] what you have trained of hunting animals which you train as Allah has taught you. So eat of what***

they catch for you, and mention the Name of Allah of upon it..."
(Qur'ân: Al-Mâ'idah: 4)

Moreover, the Prophet (PBUH) says:

"If you let loose your trained dog (for hunting) and mention Allah's Name (while releasing it), then you may eat (the game)."

(Related by Al-Bukhârî and Muslim)[1]

The hunted animal, the game, has either one of two cases after being chased and caught:

The First State: It may be caught alive. In such a case, the animal must be slaughtered according to the rules of legal slaughtering – as previously explained in the chapter of slaughtering – and it is not rendered lawful just by hunting.

The Second State: The game may be caught killed or caught while unstably alive. In such cases, it is only considered lawful if the following conditions are fulfilled:

The First Condition: The hunter must fulfill the conditions of the competent slaughterer, namely, the one who is legally accepted to slaughter. This is because the hunter assumes the role of the slaughterer in this case. Therefore, the hunter must be legally competent by being sane, Muslim or belonging to the People of the Scripture (Christians or Jews). To illustrate, it is not lawful to eat what is hunted by an insane or a drunken person, for their lack of discretion. Similarly, it is not lawful to eat what is hunted by a magus, an idolater, or other disbelievers, just like their slaughtered animals.

The Second Condition: There must be a tool used in hunting, which is one of the following two kinds:

First: A sharpened tool, which must be like the one used for slaughtering in order to cause blood to be shed. Moreover, it must be neither a tooth nor a fingernail, and it must wound the animal with its edge not by its weight. Thus, if the tool whereby the game is killed is blunt like a pebble, a staff, a snare, a net or a piece of iron, the hunted animal is considered unlawful, except those hunted by gun bullets. This is because this tool possesses a driving force that pierces and causes the blood to gush out the same as the sharp tool does or even more.

Second: Predatory animals, such as birds of prey and hunting dogs. The game killed by such animals is deemed lawful provided that they are trained, whether they hunt using their fangs, like dogs, or their claws, like birds. This is according to the noble verse in which Allah, Exalted be He, says:

"...and [game caught by] what you have trained of hunting animals which you train as Allah has taught you. So eat of what they catch for you, and mention the Name of Allah upon it..."

(Qur'ân: Al-Mâ'idah: 4)

The phrase: ***"...which you train as Allah has taught you..."*** indicates that you have to train and teach them the rules of catching the game out of the knowledge Allah has granted you. Training and teaching a predatory bird or animal means that it should obey orders; if it is set off for hunting, it goes, and if it is summoned, it complies, and when it seizes the game, it keeps it for its master until he reaches the hunted animal, and that it does not catch the game for itself.

The Third Condition: To aim or set off the means, or the tool, of hunting while having the intention of hunting. This is based on the *hadith* in which the Prophet (PBUH) says:

"If you let loose your trained dog (for hunting) and mention Allah's Name (while releasing it), then you may eat (the game)."

(Related by Al-Bukhâri and Muslim)

The *hadith* indicates that setting off a hunting bird or animal has the same conditions of slaughtering. That is, one must have the intention of hunting; accordingly, if the tool falls from the hunter's hand and kills a game, this game is considered unlawful because of the absence of intention. Likewise, if a hound sets off on its own and kills a game, the game is considered unlawful for the same reason. However, if someone shoots at a certain game and this shot hits more than one game, all are rendered lawful because the hunter basically had the intention of hunting.

The Fourth Condition: The hunter must pronounce *tasmiyah* while aiming the arrow or setting off the predatory hunting animal or bird as illustrated in the noble verse:

"And do not eat of that upon which the Name of Allah has not been mentioned..." (Qur'ân: Al-An'âm: 121)

And the other verse in which Allah, the Almighty, says:

"...So eat of what they catch for you, and mention the Name of Allah upon it..." (Qur'ân: Al-Mâ'idah: 4)

Furthermore, the Prophet (PBUH) says:

"If you let loose your trained dog (for hunting) and mention Allah's Name (while releasing it), then you may eat (the game)."

(Related by Al-Bukhârî and Muslim)

According to the previously mentioned noble verse and *hadîth*, if Allah's Name is not mentioned while hunting (i.e. if the hunter does not say *tasmiyah*), the game is not lawful.

Along with mentioning *tasmiyah*, it is an act of the *Sunnah* to glorify Allah by pronouncing *takbîr* while hunting a game, just like the case with slaughtering. This is because when slaughtering, the Prophet (PBUH) used to say:

"Bismillâh (In the Name of Allah) wallâhu Akbar (and Allah is the Greatest)."[2]

Two Warnings

The First Warning: There are certain cases in which hunting is prohibited: It is forbidden for a *muhrim*[3] to kill the land game, hunt it or help in hunting it by giving guidance, a gesture or something else. This is based on the noble verse in which Allah, the Almighty, says:

"O you who have believed, do not kill game while you are in the state of ihrâm." (Qur'ân: Al-Mâ'idah: 95)

It is also prohibited for the *muhrim* to eat from the game that he has hunted, helped in hunting, or that has been hunted for him; Allah, Exalted be He, says:

"...but forbidden to you is game from the land as long as you are in the state of ihrâm. And fear Allah to Whom you will be gathered." (Qur'ân: Al-Mâ'idah: 96)

In addition, according to the consensus of Muslim scholars, it is prohibited for a *muhrim* or a non-*muhrim* to hunt the game of Mecca. With respect to this, *Ibn 'Abbâs* (may Allah be pleased with him) narrated:

"On the Day of the Conquest of Mecca, the Messenger of Allah (PBUH) said, 'Allah has made this town (i.e., Mecca) a sanctuary

since the day He created the Heavens and the Earth, and it will remain a sanctuary by virtue of the sanctity Allah has bestowed on it until the Day of Resurrection ... Its trees must not be cut, nor must its game be chased, nor must its vegetation or grass be uprooted...'"[4]

The Second Warning: It is prohibited to possess a dog for reasons other than those permitted by the Messenger of Allah (PBUH), and they are one of three cases: hunting, guarding a livestock or guarding a plantation. The Prophet (PBUH) said:

"He who keeps a dog except one meant for watching a herd, for hunting, or for watching fields, will lose one qîrât (i.e., a great amount) of his reward every day."[5]

(Related by Al-Bukhârî and Muslim)

Yet, some people care nothing for such a threat and own dogs for purposes other than these three permitted by the Messenger of Allah (PBUH); they keep dogs just for showiness and imitation of the disbelievers. They pay no attention to the loss of rewards resulting from what they do, though if they were to lose anything of their worldly benefits, they would not endure it. There is neither might nor power save in Allah! In this connection, the Prophet (PBUH) says:

"Angels (of Mercy) do not enter a house wherein there is a dog or a picture of a living creature (a human being or an animal)."[6]

So, a Muslim must fear his Lord and not wrong himself by committing such sins and deprive himself from rewards. Indeed, Allah, Alone, is the One Whose Help is sought.

Endnotes

1 Al-Bukhârî (5484) [9/756] and Muslim (4949) [7/75].
2 Al-Bukhârî (5565) [10/29] and Muslim (5060) [7/121].
3 *Muhrim*: The one in a state of ritual consecration for *Hajj* (Pilgrimage) or *'Umrah* (Lesser Pilgrimage).
4 Al-Bukhârî (1834) [4/61] and Muslim (3289) [5/127].
5 Al-Bukhârî (2322) [5/8] and Muslim (4007) [5/484].
6 Al-Bukhârî (3225) [6/375] and Muslim (5481) [7/410].

XII: OATHS AND VOWS

CHAPTER

1

Oaths

An oath is a solemn, formal declaration to fulfill a pledge, to do or refrain from doing something, or to confirm that something is true, often calling on a sacred object as witness. An oath has a certain way to be taken.

An oath that requires expiation if not fulfilled is that taken by calling on the Name of Allah or on one of His Attributes, such as swearing "by Allah," "by the Face of Allah," "by His Magnificence," "by His Glory," "by His Sublimity," "by His Power," "by His Mercy," "by His Covenant," "by His Will," "by the Qur'ân," ...etc.

It is prohibited to take an oath by calling on other than Allah, as it is considered an act of polytheism, for the Prophet (PBUH) says:

> *"If one has to take an oath, one must swear by Allah or otherwise keep quiet."*
>
> (Related by Al-Bukhârî and Muslim)[1]

Also, he (PBUH) says:

> *"Whoever swears by other than Allah is committing an act of disbelief or polytheism."*[2]

Furthermore, the Prophet (PBUH) says:

> *"He who swears by Al-Amânah*[3] *is not one of us (i.e. he does not follow the true pathway of Muslims)."*
>
> (Related by Abû Dâwûd)[4]

The aforementioned *hadiths* state the prohibition of swearing by other than Allah and that it is considered an act of polytheism. Examples of such unlawful oaths are swearing, "By the Prophet," "By your life," "By *Al-Amânah*," "By the Ka`bah," or the like. **Ibn `Abdul-Barr** said, *"This (i.e. the prohibition of swearing by other than Allah) is unanimously agreed upon."*

Sheikh Taqiyyuddin Ibn Taymiyah said:

> *"It is prohibited to take an oath by other than Allah, and this is the opinion acted upon in the Hanbali School. Moreover, Ibn Mas`ûd and others were quoted as saying, 'I would rather take a false oath by Allah than take a true oath by other than Allah.' "*[5]

Commenting on the aforementioned statement of **Ibn Mas`ûd, Ibn Taymiyah** said:

> *"This is because the virtue of monotheism is greater than the virtue of truthfulness, and the sin of telling a lie is not so grave as that of polytheism."*[6]

Expiation for breaking an oath sworn by the Name of Allah is obligatory if the following three conditions are fulfilled:

First: An oath must be bound with intention so as to entail expiation if broken. That is, one must intend the oath to do a certain possible deed in the future. Allah, Exalted be He, says:

> ***"Allah will not impose blame upon you for what is meaningless in your oaths, but He will impose blame upon you for [breaking] what you intended of oaths..."*** (Qur'ân: Al-Mâ'idah: 89)

The verse indicates that expiation is not obligatory unless the oath is bound with intention.

Therefore, an oath is not validly effected unless it refers to something in the future, not in the past, as it is impossible to intend to do or refrain

from doing something in the past. However, if a person deliberately takes a false oath that he had done something in the past but in fact he had not for example, such an oath is called "an immersing false oath," as it "immerses" the one who commits it into sinning and, hence, into the Hellfire. Such perjury cannot be expiated for, as it is considered too grave to be expiated for. Furthermore, it is regarded as one of the major sins.

If one utters an oath unintentionally due to a force of habit, as in saying, "No, by Allah," or "Yes, by Allah," such are not considered oaths bound with intention, but meaningless words. Hence, no expiation is called for in this case, for Allah, Exalted be He, says:

"Allah will not impose blame upon you for what is meaningless in your oaths..." (Qur'ân: Al-Mâ'idah: 89)

In addition, 'Â'ishah, the Prophet's wife, (may Allah be pleased with her) narrated that the Prophet (PBUH) said regarding a meaningless oath:

"It is the usual talk of a man at his home, (such as) 'No, by Allah,' or 'Yes, by Allah.' "

(Related by Abû Dâwûd)[7]

Likewise, if one takes an oath concerning something believing it to be true but later it proves to be untrue, such an unfulfilled oath does not entail expiation. **Shaykhul-Islâm Ibn Taymiyah** said:

"The same ruling applies to swearing concerning something in the future believing it will happen, as when one takes an oath to do something, believing that another person will do it for him, and that person does not."[8]

Second: An oath must be taken voluntarily so as to entail expiation if broken. Thus, if a person is forced to take an oath, his oath is not validly effected. This is because the Prophet (PBUH) says:

"My nation is pardoned for what they commit by mistake, out of forgetfulness, and for what they were compelled to do."[9]

The *hadîth* states that breaking an oath one has been compelled to take is pardoned.

Third: An oath entails expiation if it is broken, such as doing what one has sworn not to do or refraining from what one has sworn to do. Nevertheless, if one breaks one's oath out of forgetfulness or compulsion, no expiation is called for, because, in such a case, one is

not considered to have committed a sin. This is pursuant to the *hadith* of the Prophet (PBUH) that states:

"My nation is pardoned for what they commit by mistake, out of forgetfulness, and for what they were compelled to do."[10]

Sometimes the one taking an oath adds a conditional phrase as an integral part of the wording of the oath, as in saying, "By Allah, I shall do so and so, if Allah wills." In this case, if one fails to fulfill one's oath, one is not considered to have committed perjury, as long as the conditional phrase was an integral part of the oath. The Prophet (PBUH) said:

"If anyone includes 'if Allah wills' in his oath, he will not be considered to have committed perjury if he does break his oath."

(Related by Imâm Ahmad and other compilers of *Hadîth*)[11]

However, if the phrase "if Allah wills" is not meant to be conditional in the oath, but only to seek Allah's blessing by mentioning His Name, the oath will entail expiation if broken. Likewise, if this conditional phrase, namely "if Allah wills," is separated from the utterance of the oath by a pause for no reason, this conditional phrase does not spare one the expiation for breaking such an oath. However, some other scholars maintain that the phrase, "if Allah wills," spares expiation, even if it is uttered a while after the utterance of the oath, or even if the one taking the oath utters it only after being urged by others to do so. **Shaykhul-Islâm Ibn Taymiyah** commented on the latter opinion saying, *"...and this is the sound opinion"*.

Breaking an oath may be obligatory, prohibited or permissible. To illustrate, an oath must be broken if it is taken to abandon an obligation, as when one takes an oath to sever the ties of kinship. Also, an oath must be broken if it is taken to do something prohibited, such as swearing to drink an alcoholic drink. In such cases, one must break one's oath and expiate for it.

It is prohibited to break an oath if it is taken to abandon a prohibited deed or to do an obligatory one. In such a case, the person has to fulfill his oath and it is impermissible to break it.

However, it is permissible to break an oath taken to do or abandon something permissible. The Prophet (PBUH) says:

"Whenever I take an oath to do something and (later on) I find something else better to do, I do what I find better and expiate for (breaking) my oath."[12]

The Prophet (PBUH) also says:

> *"If anyone takes an oath to do something and (later on) finds something else better to do, he should do what is better and then expiate for (breaking) his oath."*[13]

Sometimes one takes an oath to abstain from something permissible, such as food, drinks, or clothes, except for one's wife, as when one swears saying, "By Allah, I will deem what Allah has permitted prohibited for me," or, "By Allah, I will deem this food prohibited for me." That permissible thing does not become prohibited for one to have or use due to such an oath. Rather, it is permissible for one to have it or use it, yet one in this case has to expiate for breaking one's oath. This is because Allah Exalted be He, says:

> ***"O Prophet, why do you prohibit [yourself from] what Allah has made lawful for you, seeking the approval of your wives? And Allah is Forgiving and Merciful. Allah has already ordained for you (Muslims) the dissolution of your oath..."***
>
> (Qur'ân: At-Tahrîm: 1-2)

The word "dissolution" here refers to the expiation for breaking an oath taken to prohibit for oneself something made lawful by Allah.

In case a man takes an oath to abstain from having sexual intercourse with his wife, it is considered *zihâr*[14] that entails a special kind of expiation, as the expiation for breaking an oath is insufficient in this case.

In this chapter we have to point out the ruling on taking an oath by calling on a religion other than Islam, such as saying, "I will be a Jew (or a Christian) if I do so and so (or if I do not do so and so)." Such oaths are abominable and strictly prohibited. It is related in the Two *Sahîh*s that the Prophet (PBUH) says:

> *"Whoever intentionally swears falsely by calling on a religion other than Islam (i.e. swearing by saying that he is a non-Muslim in case he is telling a lie), then he is as he says (i.e. he becomes a non-Muslim)."*[15]

According to the narration of Imâm Ahmad, the Prophet (PBUH) said:

> *"When anyone takes an oath saying that he will be free from Islam (i.e. if he is telling a lie), he will be as what he has said (i.e. a non-Muslim) if he is lying; and if he is telling the truth, he will not return to Islam safely (i.e. he will not return to Islam free from sin or punishment."*[16]

We invoke Allah to protect us against evil speeches, and to mend our words, deeds, and intentions. Verily, Allah is Near and Responsive.

Endnotes

1 Al-Bukhârî (6108) [10/634] and Muslim (4233) [6/108].

2 Abû Dâwûd (3251) [3/371] and At-Tirmidhî (1539) [4/110].

3 Al-Amânah, in Arabic, carries the meanings of honesty, trust, and obedience. It can also, in this context, refer to the obligatory acts of worship ordained by Allah, such as Prayer, Fasting, Hajj (Pilgrimage), etc.

4 Abû Dâwûd (3253) [3/371].

5 'Abdur-Razzâq (15929) [8/469] and Abû Nu'aym in his book "*Al-Hilyah*" [7/267].

6 See: "*Al-Ikhtiyârât Al-Fiqhiyyah*" [p. 473].

7 Abû Dâwûd (3254) [3/372]. See also Al-Bukhârî (4612) [8/348].

8 See: '*Majmû'ul-Fatâwâ*' [35/324].

9 Ibn Mâjah (2045) [2/513] and Ad-Dâraqutnî (4306) [4/99].

10 Ibn Mâjah (2043) [2/513].

11 Ahmad (8074) [2/309], At-Tirmidhî (1536) [4/108], and An-Nasâ'î (3864) [4/38]. See also Abû Dâwûd (3261) [3/374].

12 Al-Bukhârî (6621) [11/629]. See also Al-Bukhârî (6623) [11/630] and Muslim (4239) [6/111].

13 Muslim (4249) [6/117].

14 *Zihâr* is the saying of a husband to his wife, when he wants to abstain from having sex with her, "(Sexually,) you are to me like the back of my mother," i.e. unlawful to approach sexually. That was a type of divorce practiced by Arabs in the Pre-Islamic Period of Ignorance (the *Jâhiliyyah*).

15 Al-Bukhârî (1363) [3/288] and Muslim (300) [1/303].

16 Ahmad (22906) [5/355], Abû Dâwûd (3258) [3/373], Ibn Mâjah (2100) [2/541].

CHAPTER

2

Expiation for a Broken Oath

Almighty Allah is so Merciful to His servants that He has decreed expiation for broken oaths. Allah, Exalted be He, says:

> ***"Allah has already ordained for you (Muslims) the dissolution of your oaths..."*** (Qur'ân: At-Tahrîm: 2)

Besides, it is related in the Two Sahîhs that the Prophet (PBUH) says:

> *"If you take an oath to do something and (later on) you find that something else is better than the first, then do the better one and expiate for (breaking) your oath."*

There are option and priority order concerning the expiation for a broken oath. One can choose between feeding ten needy people (half a *sâ'*[1] of food for each), clothing ten needy people (each one gets a garment proper to be worn during performing prayer), or freeing a Muslim slave void of defects. If one cannot afford any of the three aforementioned choices, one has to fast for

three days. Hence, it is clear that the expiation for breaking an oath combines both choice and priority order. Choice is between feeding ten needy people, clothing them, or freeing a Muslim slave, in the same order of priority, then comes fasting as the last alternative. The evidence of this ruling is the Qur'anic verse that reads:

> ***"...so its expiation is the feeding of ten needy people from the average of that which you feed your (own) families or clothing them or the freeing of a slave but who cannot find (or afford it) - then a fast of three days (is required)..."***
>
> (Qur'ân: Al-Mâ'idah: 89)

This verse as a whole means that the expiation for breaching an oath bound with intention is ***"the feeding of ten needy people from the average of that you feed your (own) families"***, i.e. from the best food that one normally provides for one's family, ***"or clothing them"*** with clothes proper to be worn during performing prayer, ***"or the freeing of a slave"***; most scholars agree that this slave must be a believing Muslim. In addition, Allah arranges the order of the three options of expiation according to easiness, and if any of these options is fulfilled, the expiation is unanimously deemed valid. As for the expiatory fasting of the three days, the majority of scholars stipulate that it must be performed successively according to `Abdullâh Ibn Mas`ûd's recitation of the aforementioned verse in which the word ***"successive"*** is added; ***"...then a fast of three successive days (is required)..."*** (Qur'ân: Al-Mâ'idah: 89)

Nowadays, most common people mistakenly believe that they have the choice whether to fast or to fulfill any of the three aforementioned options to expiate for their broken oaths. Hence, they fast while they can afford the feeding of ten needy people or clothing them, and this is not a valid expiation for a broken oath, since fasting is not a valid means of expiation unless one cannot afford the other alternatives. So, every Muslim must be aware of this fact.

A Muslim is permitted to make the expiation before or after breaking the oath. If it precedes perjury, it is considered dissolution of the oath, and if it succeeds perjury, it is considered expiation for the sin of perjury. The evidence of this ruling is a *hadîth* related in the Two *Sahîh*s that reads:

> *"If you take an oath to do something and (later on) you find that something else is better than the first, then do the better one and expiate for (breaking) your oath."*[2]

This *hadîth* proves that it is lawful to delay expiation until after breaking one's oath; the *hadîth* related by Abû Dâwûd reads:

> *"...then make expiation for your oath and do the better one."*[3]

The latter *hadîth* indicates the permissibility of making expiation for an oath before breaking it. Thus, the aforementioned *hadîths* state that a Muslim can make expiation before or after breaking his oath.

It is an act of the *Sunnah* (Prophetic Tradition) and a duty of a Muslim toward his Muslim brother to fulfill the latter's oath. Al-Barâ' Ibn `Âzib (may Allah be pleased with him) said:

> *"The Prophet (PBUH) enjoined us to do seven things. He (PBUH) enjoined us to visit the sick, follow funeral processions, pray for a sneezer (by saying to him, 'May Allah have mercy on you'), fulfill a Muslim's oath, help the oppressed, accept invitations, and propagate greetings (by saying when meeting one another, 'Peace be with you.' "*[4]

If an oath is repeated then broken, one is obliged to expiate for it only once, as it is regarded as one oath. Similarly, if one breaks an oath taken to do or abstain from doing many things (such as saying, "By Allah, I will neither eat, nor drink, nor do so and so,") one, in case of non-fulfillment, has to expiate for it only once, as it is considered one oath as well. Nevertheless, if one takes more than one oath to do or refrain from doing more than one deed, and then one breaks one's oaths, one has to expiate for each of the broken oaths. **Shaykhul-Islâm Ibn Taymiyah** (may Allah have mercy on him) said:

> *"Concerning repeating an oath before expiation, there are three opinions, the third of them, which is the preponderant one, is that if an oath pertains to one deed, expiating once is called for, otherwise expiation as many times as the deeds to which an oath pertains is called for."*[5]

If anyone swears not to do something, then he does it out of forgetfulness, compulsion, or unawareness, it is not deemed perjury, nor does it entail expiation. This is because Allah, Exalted be He, states in the Qur'ân that His righteous servants invoke Him saying:

> ***"Our Lord, do not impose blame upon us if we have forgotten or erred..."*** (Qur'ân: Al-Baqarah: 286)

Furthermore, a person is not held responsible for a deed he is forced to do, and Allah forgives the Muslim nation for the sins they commit by mistake, out of forgetfulness, or while being compelled to do them.

Shaykhul-Islâm Ibn Taymiyah (may Allah have mercy on him) said:

> *"If one swears, out of showing hospitality or generosity to another, that the latter* **'should'** *do something, breaking such an oath is not considered perjury. Yet, it is considered perjury if one means that the other person* **'must'** *do it..."*[6]

Notice

Allah, Exalted be He, says in the same verse, after mentioning the expiation for a broken oath:

"...and keep up your oath..." (Qur'ân: Al-Mâ'idah: 89)

Therefore, Allah commands us to keep up our oaths, and this means that one should not rush into taking oaths nor should he rush into breaking them, and that broken oaths must be expiated for. In general, this noble verse enjoins the believers to hold oaths in high esteem and not to underestimate them.

It is important to point out that some people resort to trickery to evade fulfilling their oaths, mistakenly believing that they, thus, have exempted themselves from expiation and from the consequences of taking oaths. In this regard, **Ibnul-Qayyim** (may Allah have mercy on him) warned against such evasion saying:

> *"Some people make unlawful tricks in order to evade fulfilling their oaths or expiating for breaking them. For example, a man may swear not to eat a certain loaf, not to live in a certain house for a year, or not to eat a certain food, and then he eats the whole loaf except for a small bite, lives in the said house for a whole year except for one day, or eats the said food except for a little amount. These tricks are groundless and such oaths are thus broken. Such evasive people may permit committing all kinds of deeds prohibited by the Lawgiver by avoiding committing a little part of each deed. However, keeping an oath or breaking it is just like the matter of obedience and disobedience regarding Divine ordinances. One's oath is not fulfilled unless it is fulfilled to the full, not only part of it, and thus one is regarded as an obedient servant of Allah. On the other hand, breaking part of the oath is regarded as perjury, and thus one is regarded as a disobedient servant of Allah."*[7]

It happens that someone may swear not to do something and then he makes someone else do it for him to avoid perjury. In fact, such evasion does not spare such a person the liability of his oath, unless he has already meant not to do it himself when taking the oath.

In a nutshell, it must be asserted that oaths have such a high esteem and must not be dealt with lightly, nor should people resort to trickery to evade fulfilling the liabilities of their oaths.

Endnotes

1 *Sâ`*: A standard measure that equals 2172 grams.

2 Al-Bukhârî (6622) [11/629] and Muslim (4257) [6/118].

3 Abû Dâwûd (3278) [3/380] and At-Tirmidhi (1534) [4/107].

4 Al-Bukhârî (1239) [3/145] and Muslim (5356) [7/257].

5 See "*Al-Ikhtiyârât*" [p. 474] and '*Majmû`ul-Fatâwâ*' (32/219).

6 See '*Majmû`ul-Fatâwâ*' (32/219).

7 See "*I`lâm Al-Muwaqqi`în*" (3/294).

CHAPTER

3

Vows

Linguistically, to take a vow, in Arabic, means to obligate oneself solemnly to do something. However, according to Islamic jurisprudence, a vow is a voluntary obligation taken by a competent, legally accountable person upon himself to do something seeking the pleasure of Allah, Exalted be He.

A vow is considered an act of worship that should never be meant to seek the pleasure of anyone other than Allah, Exalted be He. It must not be dedicated to a dead person in his grave, an angel, a prophet, or a righteous servant of Allah, as one, by doing so, is associating partners with Allah, which is considered an act of major polytheism that renders a person non-Muslim, as it is regarded as a kind of worship to someone other than Allah. Accordingly, those who take vows seeking the pleasure of the dead righteous people at their graves nowadays commit major polytheism. May Allah protect us all against falling into polytheism! So, those people who commit such acts must repent to Allah and avoid this major sin, and warn their people against it that they may fear Allah.

Making vows is originally detestable, and it is deemed prohibited by a group of scholars according to the *hadith* narrated by Ibn `Umar (may Allah be pleased with him) that reads:

> *"Making a vow does not prevent anything (related to fate), but it makes a miser spend his property."*

The compiler of the book entitled *Al-Muntaqâ* (*the Selected*) said, *"This hadith is related by the Group of the Compilers of Hadith excluding At-Tirmidhi."*[1] The reason behind these two rulings is that one who makes a vow obligates oneself to do something that is not originally a religious obligation, and gets oneself into a critical situation by such a vow, whereas a Muslim is enjoined to do good deeds without having to make vows.

Nevertheless, if one makes a vow to perform an act of worship, one has to fulfill it, for Allah, Exalted be He, says:

> ***"And whatever you spend of expenditures or make of vows – indeed, Allah knows of it..."*** (Qur'ân: Al-Baqarah: 270)

In another verse of the Qur'ân, Almighty Allah describes His faithful, pious worshippers saying,

> ***"They [are those who] fulfill [their] vows and fear a Day whose evil will be widespread."*** (Qur'ân: Al-Insân: 7)

Allah, Exalted be He, also says:

> ***"...and fulfill their vows..."*** (Qur'ân: Al-Hajj: 29)

Moreover, it is related in *Sahih Al-Bukhâri* (*Al-Bukhâri's Authentic Book of Hadith*) that the Prophet (PBUH) says:

> *"Whoever vows to obey Allah must obey Him, and whoever vows to disobey Allah must not disobey Him."*[2]

Imâm Ibnul-Qayyim said:

> *"As for those who commit themselves to voluntarily perform acts of worship to Allah, they do that in one of four ways. They either take an oath to perform it, or vow to perform it, or take an oath emphasized by a vow to perform it, or take a vow emphasized by an oath to perform it. Allah says,* ***"And among them are those who made a covenant with Allah, [saying], 'If He should give us from His bounty, we will surely spend in charity...' "*** (Qur'ân: At-Tawbah: 75) *Such a vow must be fulfilled or else the one who makes*

> *it will be subject to the punishment stated in the verse that reads,* **"So He penalized them with hypocrisy in their hearts..."** (Qur'ân: At-Tawbah: 77) *Thus, vowing to perform a voluntary act of worship is worthier of fulfillment than feeling obliged to perform it as in saying, 'I owe Allah to do so and so.'* "[3]

Faqîhs (may Allah have mercy on them) stipulate that a vow must be voluntarily made by a competent, sane, discriminating, adult person so as to be validly effected. They base this opinion on the *hadîth* in which the Prophet (PBUH) says:

> *"There are three (persons) whose actions are not recorded: A minor until he reaches puberty, a lunatic until he comes to reason, and a sleeper until he awakes."*[4]

This *hadîth* proves that the above-mentioned three kinds of people are not obligated to fulfill any vows they may take, as they are not legally accountable for their deeds.

The vow made by a disbeliever is deemed valid if it is made to perform an act of worship, and if such a disbeliever converts to Islam, he has to fulfill the vow he has taken while being a disbeliever. 'Umar Ibnul-Khattâb (may Allah be pleased with him) narrated that he had once made a vow in the Pre-Islamic Period of Ignorance (the *Jâhiliyyah*) to seclude in the Sacred Mosque for one night, so the Prophet (PBUH) said to him: *"Fulfill your vow."*[5]

Valid Vows are of Five Kinds

1- An Absolute Vow

It is the vow made by saying, for example, "I owe Allah a vow," without defining a certain act of worship to perform due to vowing. The expiation for such a vow is the same as that for a broken oath, whether the vow is conditional or not. This is because 'Uqbah Ibn 'Âmir (may Allah be pleased with him) narrated that the Prophet (PBUH) said:

> *"The expiation for (breaking) a vow which is not defined is the same as that for (breaking) an oath."*[6]
>
> (Related by Ibn Mâjah and At-Tirmidhî who deemed it a hasan sahîh gharîb)[7]

This *hadîth* states that it is obligatory to expiate for an absolute vow if the act of worship dedicated to Allah, Almighty and Ever-Majestic be He, is not defined in the vow.

2- A Vow Taken in a State of Importunity or in a Fit of Anger

It is a conditional vow meant to either prevent someone from doing something, to urge him to do it, or to make someone believe something, or disbelieve in it. For example, when one says, "I vow to perform *Hajj* (or free a slave) if my speech proves untrue or if I speak to you, or about you." A person who takes such a vow may choose between fulfilling his vow and expiating for it just like a broken oath. This is because `Imrân Ibn Husayn (may Allah be pleased with him) narrated that he heard the Prophet (PBUH) saying:

> *"No vows taken in a fit of anger (are valid), and the expiation for such a vow is the same as that for (breaking) an oath."*
>
> (Related by Sa`îd Ibn Mansûr in his book of Hadîths)[8]

3- A Vow Taken to Do an Ordinary, Permissible Act

An example of such a vow is vowing to wear one's garment or to ride one's pack animal. In this case, one may choose between fulfilling one's vow and expiating for it if one refrains from doing the said act, the same as the expiation for breaking an oath, just like the second case. The opinion of Ibn Taymiyah (may Allah have mercy on him) in this regard is that no expiation whatsoever is called for in case of breaking a vow to perform a permissible act. He grounds this ruling on the *hadîth* related by Al-Bukhârî that reads:

> *"While the Prophet (PBUH) was delivering a sermon, he saw a man who remained standing, so he asked about the man. They (the people) said, 'It is Abû Isrâ'îl who has taken a vow to stand and never sit down, never come in the shade, nor speak to anybody, and to fast.' The Prophet (PBUH) said, 'Order him to resume speaking, come in the shade, and sit down, but let him complete his fast.' "*[9]

4- A Vow Taken to Commit an Act of Disobedience to Allah

An example of such a kind of vow is vowing to drink intoxicating liquors or to fast the days of menstruation or the Day of Sacrifice. It is impermissible to fulfill such a vow, as the Prophet (PBUH) says:

> *"Whoever vows to disobey Allah must not disobey Him."*

This *hadîth* states that it is impermissible to fulfill a vow to disobey Allah, because one is never permitted to disobey Allah under any circumstances.

Another example of vows of disobedience to Allah is the vows taken to be fulfilled at the graveyards seeking the pleasure of the dead buried therein. Such

a deed is considered major polytheism as previously mentioned. Expiation for such a vow is the same as that for a broken oath according to some scholars, the opinion which is based on the narrations of Ibn Mas`ûd, Ibn `Abbâs, `Imrân Ibn Husayn, and Samurah Ibn Jundub (may Allah be pleased with them all).

However, some scholars maintain that a vow taken to commit an act of disobedience to Allah is originally invalid and it entails no expiation. This is one of the opinions attributed to Imâm Ahmad, and it is the opinion of the Hanafi, the Mâliki, and the Shâfi`i Schools. It is also the opinion maintained by **Shaykhul-Islâm Ibn Taymiyah** who said:

> *"The vows to furnish a grave, a mountain, or a tree with lights, and the vows dedicated to such places, their inhabitants, or their visitors, are impermissible to be taken; such vows are impermissible to be fulfilled as scholars unanimously agree. Such objects (i.e. the lamps, money, or whatever is put in such places due to vows) are to be gathered and used for the benefit of the public, as long as the identities of their owners are unknown (to return these objects to them)."*[10]

5- A Vow to Perform a Pious Act

It is a vow taken to perform an act of obedience to Allah, like performing Prayer, Fasting, *Hajj* (Pilgrimage) and so forth. Such a vow can be absolute (i.e. unconditional), as in saying, "I have taken a vow to fast (or pray)," or conditional, as in saying, "If Allah cures so and so, I vow to perform such and such an act of worship." In the latter case, once the condition is fulfilled, it becomes obligatory for the one taking the vow to fulfill it. The Prophet (PBUH) says:

> *"Whoever vows to obey Allah must obey Him."*
>
> (Related by Al-Bukhâri)[11]

Moreover, Allah, exalted be He, says:

> ***"They (are those who) fulfill their (vows)..."***
>
> (Qur'ân: At-Tahrîm: 7)

Almighty Allah also says:

> ***"...and fulfill their vows..."*** (Qur'ân: Al-Hajj: 29)

And, Allah knows best.

Endnotes

1 Al-Bukhâri (6608) [11/608], Muslim (4213) [6/99], Abû Dâwûd (3287) [3/384], An-Nasâ'i (3810) [4/21] and Ibn Mâjah (2122) [2/552]. See also At-Tirmidhî (1542) [4/112].

2 Al-Bukhâri (6696) [11/708].

3 See "*I'lâm Al-Mûwaqqi'în*" (2/122).

4 Abû Dâwûd (4403) and An-Nasâ'i (3462).

5 Al-Bukhâri (2032) [4/348] and Muslim (4268) [6/126].

6 At-Tirmidhî (1532) [4/106], Ibn Mâjah (2127) [2/554]. See also Muslim (4229) [6/106], Abû Dâwûd (3323) [3/398] and An-Nasâ'i (3841) [4/33].

7 *Gharib* (Unfamiliar) *hadith*: A *hadîth* reported by just one narrator at even one stage of the chain of transmission.

8 An-Nasâ'i (3851) [4/35].

9 Al-Bukhâri (6704) [11/714].

10 See "*Al-Ikhtiyârât Al-Fiqhiyyah*" [476].

11 See "*I'lâm Al-Mûwaqqi'în*" (2/122).

XIII: QAḎÂ`
(JUDICIARY)

CHAPTER

1

Judiciary in Islam

Shaykhul-Islâm Ibn Taymiyah (may Allah have mercy on him) said:

> *"It is obligatory to assume the judiciary as a religious duty and as a means of drawing near to Allah. In fact, it is one of the best means of achieving nearness to Allah. However, many persons in this position have been corrupted because of seeking leadership and wealth through it."*[1]

Judiciary is legislated according to the Qur'ân, the *Sunnah* (Prophetic Tradition) and consensus of Muslim scholars. Allah, Exalted be He, says:

> ***"And judge, [O Muhammad], between them by what Allah has revealed ..."*** (Qur'ân: Al-Mâ'idah: 49)

And He also says:

> ***"[We said], O David, indeed We have made you a successor upon the earth, so judge between the people in truth..."***
> (Qur'ân: Sâd: 26)

Moreover, the Prophet (PBUH) himself undertook that responsibility and appointed judges in the regions that were under the Islamic rule, and so did the Caliphs that succeeded him. Furthermore, Muslim scholars agree uniformly on the necessity of assigning judges to settle disputes among people.

Jurisprudentially speaking, the judiciary indicates the clarification of the legal ruling and applying it as well as settling disputes.

As for the judge, **Shaykhul-Islâm Ibn Taymiyah** (may Allah have mercy on him) said:

> *"The judge assumes the role of a witness with regard to providing evidence, the role of a mufti*[2] *with regard to issuing rulings, and the role of a person in authority with regard to having judgments implemented."*[3]

In Islam, the judiciary is a collective duty as it is an indispensable thing in people's affairs. In this respect, **Imâm Ahmad** said, *"There must be a judge among people so that rights are not lost."* Moreover, **Shaykhul-Islâm Ibn Taymiyah** said, *"The Prophet (PBUH) has made it a duty to appoint one as leader when a small group is on a journey*[4]*. Such a command goes for all kinds of assemblies."*[5]

If only one competent person exists who can undertake judgeship, then it is an individual obligation upon him to do so. That is because undertaking judgeship involves a great reward for the one who is capable of observing it according to the legally prescribed way. Nevertheless, assuming judgeship involves grave danger for the one who does not apply it according to the legally prescribed way.

When appointing judges, the ruler of Muslims has to appoint judges according to the requisites of the public interest so that rights are not lost. Besides, the ruler has to select the best persons in terms of knowledge and piety. However, if the ruler is not able to decide whether a certain person fits that position or not, he should inquire about him.

With regard to the judge, he has to make every effort to establish justice among people. Thus, the judge is not obligated to observe what is beyond his capacity or be blamed for it. The person in authority has to allocate a sufficient salary from the Muslims' Public Treasury for the judge to cover his expenses so that he can dedicate himself exclusively to his job. In support of this view, the Rightly-guided Caliphs have assigned sufficient salaries from the Muslims' Public Treasury for judges.

The judge's powers are to be referred to the conventions prevailing in each age separately. In this relation, **Shaykhul-Islâm Ibn Taymiyah** (may Allah have mercy on him) said:

> *"As for the powers of the ruler, they are not specified by legislation; rather, they are dependent on the customs and conventions."*[6]

This is due to the fact that whatever is not decided by legislation is to be referred to convention. **Ibn Taymiyah** added:

> *"The position of the judge can be divided; namely, it can be held by many people, for each is a certain area of jurisdiction. Besides, it is not obligatory for the judge to be cognizant of areas other than his. That is because the position of practicing ijtihâd can be divided. Assuming that the judge is assigned to decide on matters relating to the distribution of the shares of inheritance, it is not obligatory upon him to be cognizant of matters other than the rulings pertaining to the laws of inheritance, bequests and such related matters. Likewise, if the judge is assigned to decide on matters relating to marriage contracts, it is not required from him to be knowledgeable of other unrelated matters. Hence, it is permissible to assign a judge to decide on matters relating to his area of knowledge and whatever does not belong to that area is viewed out of his competence. This is applicable in the case of the one who undertakes the position of the judge to render a judgment concerning a certain matter related to the disbelievers who confess satisfaction concerning his being a judge. Moreover, if someone, who is in the state of ihrâm, hunts a game from the land, then two just persons are to be appointed to judge his case. Hence, it is permissible to appoint persons as judges to decide on certain cases at specific situations; yet, they are not to be viewed as judges who have the competence to decide on all cases."*[7]

Nowadays, the Ministry of Justice has adopted a system to which judges stick; each judge has his own area of jurisdiction and powers. That is, judges have to refer to that system and be committed to it, for such a system is considered a means of regulating matters and specifying jurisdiction. Besides, that system does not contradict any of the texts of the Qur'ân or the *Sunnah* (Prophetic Tradition), so it must be acted upon and adhered to.

The necessary qualifications (that should be considered as much as possible) for being an Islamic judge are:

- To be a legally accountable person, namely to be adult and sane. That is because the non-legally accountable person is under the guardianship of others, so such a person cannot be the judge of others, for the judge assumes the position of the ruler.
- To be a male; this is due to the *hadîth* in which the Prophet (PBUH) says:

  "The people who are ruled by a woman will never be successful."[8]
- To be a freeman; that is because the slave is busy looking after the rights of his master.
- To be a Muslim; this is due to the fact that Islam is the condition of being just. Besides, it is required to degrade the disbeliever, not to raise him in rank through appointing him in such a sublime position of judgeship.
- To be upright; that is because it is impermissible to appoint the defiantly disobedient person. This is due to the statement of Allah, in which He says:

  "O you who have believed, if there comes to you a disobedient one with information, investigate..." (Qur'ân: Al-Hujurât: 6)

  Accordingly, as it is not permissible to accept information from such a person, his judgment is to be rejected with greater reason.
- To have sound hearing; that is because the deaf cannot hear the speech of the two litigants.
- To have sound eyesight; that is because the blind judge cannot distinguish between the plaintiff and the defendant.

  In this respect, **Shaykhul-Islâm Ibn Taymiyah** said:

  "According to the analogical deduction of the Hanbalî School, it is permissible to appoint a blind person as a judge just as his testimony is accepted. That is because such a person lacks nothing but seeing the litigants, a thing which he does not need, for he can judge according to description. This is supported by the fact that Prophet Dâwûd (David) (PBUH) judged between two angels. Besides, it tends to be viewed absolutely permissible to appoint a blind man as a judge. In such a case,

the blind judge is to be told who the witnesses and litigants are, just as the normal judge is told of the meanings of their speech in case translation is needed. This is because knowing who the litigants' identities and getting the meaning of their speech are equally important."[9]

- The judge must have the faculty of speech. That is because the dumb person cannot deliver the judgments. Besides, many people do not comprehend the signs used by such a person.
- The judge must be one who exercises *ijtihâd*. He must exercise *ijtihâd*, even in the school he adopts, in which he follows the opinions of one of the great scholars. That is, the judge has to be able to differentiate between the sound and unsound rulings in that school.

With regard to these conditions, **Shaykhul-Islâm Ibn Taymiyah** (may Allah have mercy on him) said:

> *"These necessary qualifications are to be considered as much as possible. Further, the position of judgeship must be undertaken by the best among people. This is the view adopted by Imâm Ahmad and others. Accordingly, if there are defiantly disobedient persons and one of them must be chosen to undertake judgeship, the most suitable amongst them is to be chosen. Likewise, if there are some persons who do not exercise ijtihâd but follow a certain jurisprudential school, the most upright and learned of them, with regard to following the opinions of such a school, is to be appointed."*

In this connection, the compiler of *Al-Furû'* (*The Branches*) said, *"The soundest opinion is what has been said by Ibn Taymiyah."* Besides, the compiler of the book entitled *Al-Insâf* (*Justice*) said with regard to the issue of appointing the one who imitates the opinions adopted in a particular jurisprudential scholar, *"...Such a view has been applied for a long time, so as not to suspend people's affairs and interests."*[10]

Moreover, **Imâm Ibnul-Qayyim** said:

> *"The one who exercises ijtihâd is the one who possesses knowledge of the Noble Qur'ân and the Sunnah. In addition, the ijtihâd of such a person does not forbid him from adopting the opinions of other scholars in certain cases. That is because one finds all the great scholars building their judgments on the opinions of those who are above them in knowledge with regard to some issues."*[11]

Endnotes

1 See "*Al-Ikhtiyârât*" [p. 480].
2 *Mufti*: A Muslim scholar specialized in issuing legal rulings in response to a layman's question on a point of the Islamic Law.
3 See "*Al-Ikhtiyârât*" [p. 481].
4 As came in the *hadith* related by Abû Dâwûd (2608, 2609) [3/58].
5 See "*Al-Ikhtiyârât*" [p. 480].
6 See "*Al-Ikhtiyârât*" [p. 480].
7 See "*Al-Ikhtiyârât*" [pp. 485-486].
8 Al-Bukhârî (4425) [8/159].
9 See "*Al-Ikhtiyârât*" [p. 486].
10 See '*Al-Insâf*" (11/170).
11 See '*I'lâm Al-Muwaqqi'in*' (1/7).

CHAPTER

2

Judge Ethics

Imâm Ahmad (may Allah have mercy on him) said, *"Good manners means not to get angry or rancorous."* Moreover, **Imâm Ibnul-Qayyim** (may Allah have mercy on him) said:

> *"The judge needs to know three matters, if any of which is absent, the judgment becomes invalid: knowing the evidence, reasons, and clear proofs. For more illustration, the evidence guides the judge to know the general legal ruling, the reasons guide him to know the applicability of such a ruling to a certain case, while the clear proofs guide him to know the way of passing a judgment when there is contradiction in evidence. Thus, whoever errs in one of the three, errs in his judgment.*

It is recommended that the judge be strong without harshness so that the oppressor does not belittle him, and flexible without weakness so that the people entitled to rights may not fear him. In this respect, **Shaykhul-Islâm Taqiyyud-**

Dîn Ibn Taymiyah (may Allah have mercy on him) said, *"Judgeship has two pillars: strength and trustworthiness."*[1] In addition, the judge should be patient so as not to get angry at the words of the litigant and thus unable to judge justly. That is, patience is the ornament, beauty and splendor of knowledge; and it is contrary to impatience, rashness, hastiness, irritability, and instability. Besides, the judge should be patient so as not to misjudge among litigants. Moreover, he should be discerning so that he could not be deceived by some litigants. Furthermore, the judge should be virtuous by keeping himself away from all prohibited matters. Further, he should be knowledgeable of the judgments passed by the preceding judges. The place of the court should be in the middle of the town, if possible, so that people do not face hardship in reaching it. Besides, there is no harm in sitting in a mosque to decide cases, as it is reported that `Umar Ibnul-Khattâb, `Uthmân Ibn `Affân and `Alî Ibn Abû Tâlib used to sit in the mosque to decide cases. In addition, the judge should treat the two litigants impartially and justly in terms of the way he looks at them, the way he addresses them, the places where they sit, the way he receives them, and so forth. In this regard, Abû Dâwûd related on the authority of Ibnuz-Zubayr (may Allah be pleased with him) who narrated:

> *"The Messenger of Allah (PBUH) gave the judgment that the two adversaries should be made to sit before the judge."*[2]

With regard to this, **Imâm Ibnul-Qayyim** said:

> *"It is prohibited for the judge to set one of the two litigants above the other, give him more attention, consult him, or stand up for him as a means of honoring him. That is because such acts may cause the other litigant to feel disheartened and unable to express his argument. The judge also should not show his disapproval of the litigants, as it may cause them disheartenment and frustration, and hold their tongues from expressing their arguments."*[3]

In addition to this, it is deemed prohibited for the judge to have a secret discourse with one of the litigants, to tell him what to say, to entertain him, or to teach him how to deliver his argument, except when one of the litigants forgets something necessary and it must be explained to him when presenting the case.

Besides, the judge's sessions should be attended by the *faqih*s and he should consult them concerning whatever may be difficult or doubtful for him. Thus, if the ruling is clear to the judge, he is to pass his judgment; if not, he must delay passing his judgment until he makes sure of it.

It is deemed prohibited for the judge to decide cases when being in a state of great anger. This is due to the *hadith*, in which the Prophet (PBUH) said:

> *"A judge must not judge between two persons while he is in an angry mood."*[4]

That is because anger affects both the judge's mind and heart and thus blocks his sound comprehension and wise consideration. Likewise, every matter that may affect the judge's temperament for the worse, such as hunger, thirst, anxiety, boredom, sleepiness, retention of urine or stool, or when the weather is irritatingly hot or cold, has the same ruling applied to anger. This is based on the fact that such mattes disturb and confuse the mind in a way that may prevent the judge from reaching a sound decision.

Further, it is prohibited for the judge to receive bribes. This is due to the *hadith* narrated by Ibn 'Umar (may Allah be pleased with him) in which he said:

> *"The Messenger (PBUH) cursed the one who bribes and the one who takes bribe."*[5]

Commenting on this *hadith*, **At-Tirmidhi** said, *"This is a hasan sahih hadith."*

In this regard, bribes are of two kinds:

1- A bribe taken from one of the two litigants in order to decide in his favor.

2- A bribe given to the judge who abstains from judging in favor of the rightful person until he bribes him. This is one of the gravest acts of injustice.

In addition, it is prohibited for the judge to accept gifts from those who did not use to give him gifts before he became a judge. In this respect, the Prophet (PBUH) said:

> *"Gifts given to governors are (considered) ill-gotten property."*
>
> (Related by Ahmad)[6]

That is because accepting gifts from someone who did not use to give the judge gifts before he became a judge is an excuse to decide in that person's favor.

Furthermore, it is detestable for the judge to sell or buy except through an agent who should not be known as the judge's agent, for fear of partiality. That is, partiality in purchasing and selling is similar to the previous ruling pertaining to gifts.

The judge may not decide cases in which he is involved or cases involving any of those to whom his testimony cannot be accepted, such as his father, son, wife, or enemy, for, in such cases, he is suspected of partiality. Therefore, if any of such cases is assigned to him, he is to refer it to another judge. This is supported by the fact that 'Umar Ibnul-Khattâb referred the case of Ubayy to Zayd Ibn Thâbit to decide it, and 'Alî referred an Iraqi man to Shurayh to judge his case, and 'Uthmân referred Talhah to Jubayr Ibn Mut'im (may Allah be pleased with them all) for judgment.

It is desirable for the judge to first look into the cases demanding summary decisions, such as those of the imprisoned, minor orphans and lunatics, then the cases of endowments and bequests that have no guardian.

With regard to the decisions made by the judge, they are not to be invalidated unless they contradict the rulings of the Noble Qur'ân, the *Sunnah*, or a decisive consensus of Muslim scholars. If the judge does so, his decisions are not to be implemented, as they contradict the Qur'ân, *Sunnah* or the consensus.

In the light of this brief presentation of the ethics of the judge, the justice of the judiciary in Islam becomes evident. In other words, judges in Islam assume a high rank that cannot be reached through all the worldly law systems. True are the Words of Allah in which He says:

> ***"Then is it the judgment of [the time of] ignorance they desire? But who is better than Allah in judgment for a people who are certain [in faith]."*** (Qur'ân: Al-Mâ'idah: 50)

May Allah disgrace those who turn away from that divine judgment and replace it with Satan's law. Those are the people whom Allah meant in the noble verses:

> ***"...those who exchanged the favor of Allah for disbelief and settled their people [in] the home of ruin? [It is] Hell, which they will [enter to] burn, and wretched is the settlement."***
>
> (Qur'ân: Ibrâhîm: 28-29)

Endnotes

1 See "*Al-Ikhtiyârât*" [p. 480].
2 Abû Dâwûd (3588) [4/14].
3 See "*Zâdul-Ma'âd*" (4/96).
4 Al-Bukhârî (7158) [13/169] and Muslim (4465) [6/241].
5 Abû Dâwûd (3580) [4/10], Ibn Mâjah (2313) [3/91] and At-Tirmidhi (1340) [3/622].
6 Ahmad (23492) [5/424] and Al-Bayhaqî (20474) [10/233].

CHAPTER

3

Method of Undertaking Judgment

When two litigants come to a judge to decide their case, he seats them before him and asks, "Who is the plaintiff?" Or he may wait until the plaintiff speaks presenting his claim. The judge then should listen carefully to the claim. If the claim is presented properly, the judge then is to ask the defendant, "What is your defense?" If the defendant admits that the claim is true, the judge may give a decision in favor of the plaintiff. But if the defendant denies the claim, the judge is to turn again to the plaintiff asking him to present proof if he has any. That is because the plaintiff is the one who should substantiate his claim in order to get his right. When the plaintiff brings the proof, the judge is to pass the judgment according to the proofs.

The judge is not to judge according to his own knowledge (apart from other sources of information) as this may lead to his being suspected. In this regard, the great scholar **Ibnul-Qayyim** (may Allah have mercy on him) said:

"When the judge decides a case according to his own knowledge, then he may decide it unjustly and defend himself saying that he has done so depending on his own knowledge."[1]

He also said:

"It is authentically reported that Abû Bakr, 'Umar, 'Abdur-Rahmân Ibn 'Awf and Mu'âwiyah viewed such an act prohibited and none of the Prophet's Companions was known to disagree with them. Besides, the master of judges, the Prophet (PBUH), knew some matters about the hypocrites that would make it lawful to kill them and take their wealth. However, he did not decide their case in terms of his own knowledge, though there would be no offense on him if he did so, for he is free from any suspicion and trusted by Allah, His angels and His servants."

Ibnul-Qayyim added:

"...However, it is permissible for the judge to decide the cases according to what is available before him of recurrently reported information, namely, there are many who share knowledge with him. Moreover, it is permissible for the judge to decide a case according to the information that many people other than him have knowledge of. Thus, it is permissible for him to depend on such recurrent information in passing judgments as they are considered among the most preponderant proofs. Consequently, the decision of the judge will not be suspected if he establishes his opinion on this common information, as it will be based on proof not merely on his own knowledge."

With regard to the plaintiff, if he says, "I have no proof to substantiate my claim," then the judge is to inform him that he may request that the defendant swear. This is according to the *hadîth* related by Muslim and Abû Dâwûd that states:

"Two persons referred their case to the Prophet (PBUH); one of them was from Hadramaut and the other was from Kindah. The one who had come from Hadramaut said, 'O Messenger of Allah! This man has appropriated my land which belonged to my father. The one who had come from Kindah said, 'This is my land and it is in my possession; he has no right in it.' The Messenger of Allah (PBUH) said to the man from Hadramaut, 'Do you have any evidence (to support your claim)?' He replied in the negative. Thereupon, the Messenger of Allah (PBUH) said, 'Then, your case is to be decided on his oath.'"[2]

In this respect, **Imâm Ibnul-Qayyim** said:

> *"This is the continuous rule of the Sharî'ah (Islamic Law). Hence, the oath is to be taken by the defendant, as the plaintiff has not brought forth anything supporting his claim. Thereupon, the defendant is the one who is to take the oath, as there is no proof against him and he is primarily innocent. In other words, the defendant is the stronger of the two litigants due to the original principle of being innocent; thus, the oath is to be taken by him."*[3]

Therefore, if the plaintiff requests that the defendant take an oath, the judge is to make him do so and then set him free, as the principle states his innocence. Nevertheless, it is stipulated, for the validity of the defendant's oath, that the oath is to be a reply to what the plaintiff claims. Moreover, the oath is to be taken by the defendant after the plaintiff's request, as it is a right of the plaintiff which must not be taken except after his request.

However, if the defendant abstains and refuses to swear, then he is judged as being guilty, under the conditions of his abstention from taking the oath. That is because if the plaintiff's claim was untrue, the defendant would defend himself by taking the oath. So, his refusal to take an oath is considered an evident proof indicating the truthfulness of the plaintiff in whatever he claims. Thus, such a proof is to be considered regardless of the principle stating the innocence of the defendant until proven guilty. Considering the defendant guilty in case he refuses to take an oath is the opinion adopted by many scholars, and 'Uthmân (may Allah be pleased with him) passed judgments according to it. In this regard, some scholars say, *"If the defendant refuses to swear, then the judge is to ask the plaintiff to swear, especially if his claim is substantiated."*

With regard to the issue of taking an oath, **Imâm Ibnul-Qayyim** (may Allah have mercy on him) said:

> *"The Sharî'ah ordains that the oath is to be taken by the one whose proofs outweigh those of the other litigant. Accordingly, the one whose side is substantiated more than the other is the one who is to take an oath. This is the opinion adopted by the majority of scholars, such as the scholars of Medina and the scholars of Hadîth like Ahmad, Ash-Shâfi'î, Mâlik and others."*

He added:

> *"...Moreover, this opinion has been applied by the Prophet's Companions, and viewed sound by Imâm Ahmad and other scholars."*

He also said:

"This opinion is not difficult to be applied; the oath is to be taken by the plaintiff and he will take his right. Furthermore, Shaykhul-Islâm Ibn Taymiyah adopted that opinion."[4]

In addition to this, **Abû `Ubayd** said:

"Asking the plaintiff to take the oath (in case the defendant refuses to take the oath) has its roots in both the Noble Qur'ân and the Sunnah (Prophetic Tradition)."

Shaykhul-Islâm Ibn Taymiyah (may Allah have mercy on him) said:

"What has been reported from the Prophet's Companions concerning the defendant's refusal to take an oath and that the judge in this case asks the plaintiff to swear, does not contradict each other. Rather, each of the two matters has its own position. To illustrate more, in case the plaintiff knows the truth of his claim and the defendant refuses to swear, the plaintiff may swear that his claim is true and thus becomes entitled to what he claims. But if the plaintiff refuses to take the oath, then the judge is not to judge in his favor on basis of the abstention of the defendant to take the oath. This is the same as the case of `Uthmân Ibn `Affân (may Allah be pleased with him)."[5]

Commenting on what Ibn Taymiyah has said, **Ibnul-Qayyim** says:

"The opinion adopted by our Sheikh Ibn Taymiyah is the decisive one concerning the defendant's refusal to take an oath and permitting the plaintiff to do so."[6]

He went on saying:

"If the truth of the claim is dependent solely on the defendant and he refuses to take an oath, then the judge is to judge against him. Whereas, if the truth is solely dependent on the plaintiff, then the judge is to ask him to swear, but if he refuses, then the judge is not to decide in his favor on the basis of the defendant's refusal (to take the oath). This is the best review concerning the rulings on both the defendant's refusal to take an oath and referring the oath to the plaintiff."[7]

However, if the defendant takes an oath denying the claim of the plaintiff and thus the judge sets him free, as mentioned above, and after that the plaintiff comes again with proof, then it is one of two cases. The first case, if the plaintiff has previously said that there is no proof, then the judge is not to

listen to his proof, as the plaintiff has denied it before. The second case, if the plaintiff has not denied its existence, then the judge is to listen to this proof and judge accordingly.

In this connection, it is worth mentioning that the oath taken by the denier (the defendant) is not considered a means of eliminating the truth of the claim, as the claim is not invalidated through taking oaths. Rather, the oath taken by the denier is a means of ending the dispute, not eliminating the right of the plaintiff. Likewise, if the plaintiff states that he has no proof and after that he finds one, then the judge should consider it and judge accordingly. This is because the plaintiff has not denied it in the first place. And Allah, Exalted be He, knows best.

Endnotes

1 See: "*Zâd Al-Ma'âd*" (4/96).
2 Muslim (356) [1/340]. See also Abû Dâwûd (3245) [3/368] and At-Tirmidhî (1344) [3/625].
3 See the footnote in *Ar-Rawd Al-Murbi'* [7/543].
4 See "*Zâd Al-Ma'âd*" (4/96).
5 See the footnote in *Ar-Rawd Al-Murbi'* (7/545).
6 See "*At-Turuq Al-Hukmiyyah*" (pp. 122-135).
7 See the footnote in *Ar-Rawd Al-Murbi'* [7/545].

CHAPTER

4

Valid Court Claim: Conditions

The claim is not valid unless it is presented in detail. So, if the claim is about a debt owed from a dead person, for example, then the death of the indebted, the type of the debt and its amount as well as all the other related information that may clarify the claim must be mentioned. This is due to the fact that the decision is dependent on such details. That is why Allah's Messenger (PBUH) said:

"...I give my judgment according to what I hear."[1]

Hereby, the *hadith* refers to the obligation of clarifying the claim so as to clarify to the judge the reasons and facts needed for the decision.

It is not valid also to litigate over something unknown or unspecified; the object of claim should be known so as to be attained and obligated when the validity of the claim is proven. However, there are some exceptions to this ruling, as it is valid to do so in some cases, such as claiming a bequest in which a person bequeaths some of his wealth or one of his slaves as a dowry or suchlike. In

such a case, the claim is valid, even if the thing litigated over is unknown or unspecified.

Moreover, the claim must be declared. So, it is not enough for the plaintiff to say, "He owes me such and such," but he (the plaintiff) must declare that he claims such a thing. Besides, the thing litigated over must be due, as the claim is not valid for a debt on credit. This is because the defendant is not to be demanded for the debt before its due time and, also, he is not to be imprisoned for it.

Furthermore, the claim must not involve what disproves it. For example, it is invalid to claim that someone killed somebody or stole something twenty years ago while the defendant's age is less than twenty, as the claim would be illogical.

If it is litigated over a selling or renting contract, the claim, in order to be valid, must involve the conditions of the contract. This is due to the fact that some people may dispute over them. Besides, that contract may be invalid from the judge's point of view.

In addition, if the claim relates to inheritance, the reason entitling it must be clarified. That is because the reasons obligating inheritance differ, so the reason on which the claim is established must be defined.

Further, the valid claim must define the object litigated over; whether it is present in the court or the country, so as to eliminate obscurity. However, if the claimed object is not present, then it must be described with a description like that connected with buying, namely, to state all the necessary descriptions of the object.

In addition to this, justice (truthfulness) is considered a prerequisite for the validity of the evidence. This is due to the noble verse in which Allah, Exalted be He, says:

> ***"...And bring to witness two just men from among you..."***
>
> (Qur'ân: At-Talâq: 2)

Allah also says:

> ***"...from those whom you accept as witnesses..."***
>
> (Qur'ân: Al-Baqarah: 282)

And:

> ***"O you who have believed, if there comes to you a disobedient one with information, investigate..."*** (Qur'ân: Al-Hujurât: 6)

In this regard, *faqihs* (may Allah have mercy on them) differ as to whether the witness must be an outwardly and inwardly just (true) person or being an outward just person is enough. There are two different opinions, the prepon-

derant of which deems an outwardly just person a valid witness. This is based on the fact that the Prophet (PBUH) accepted the testimony of a Bedouin (i.e., the Prophet (PBUH) considered his outward state). Besides, `Umar (may Allah be pleased with him) said, *"Muslims are just."*[2]

In this respect, the judge is to judge depending on the just evidence unless he knows otherwise. That is, if he knows that such evidence is contradicted (by others), then it is not permissible for him to decide according to it.

As for the witnesses whose justice (i.e., truthfulness) is not known to the judge, he is to inquire about them. He may ask persons who are well acquainted with those witnesses such as friends, neighbors or persons dealing with them financially. In this regard, `Umar (may Allah be pleased with him) said to a man who recommended another man before him:

> *"Are you a neighbor of his?" The man replied in the negative. Then, `Umar asked him again, "Have you ever accompanied him in traveling where the true nature of men appears)?" The man said, "No." `Umar asked him for the third time, "Have you ever dealt with him financially?" The man replied in the negative. Upon this, `Umar said, "Then, you do not know him."*[3]

If there is contradiction between the proofs invalidating and those validating the witnesses, namely, there are signs indicating their non-uprightness for testimony as well as others indicating their uprightness, the judge must give precedence to the issue of their non-uprightness (i.e., not to accept their testimony). This is supported by the fact that the one refuting the uprightness of a witness knows something unperceived by the one who recommends him. Besides, such a person tells about something unknown by others while the one viewing the uprightness of the witness for testimony tells only about something outward. Moreover, the one refuting the uprightness of a witness is proving something (to substantiate his view) while the one who views otherwise tries to deny something already proved. It is stated as a general principle that what is proved is to be given precedence to what is denied. In this connection, when the defendant acknowledges the justice and truthfulness of the evidence, it is considered just and true accordingly. That is because seeking the truthfulness of the evidence is a means of ensuring his right. Moreover, his acknowledgement of the truthfulness of the evidence is regarded as an acknowledgment of the right he owes to the other litigant (the plaintiff). So, the defendant is to be judged in consideration of his acknowledgment of the truthfulness of the evidence.

As for the judge, if he knows the truthfulness of the evidence, then he must decide the case according to it and he does not need recommendation. Otherwise, if the judge knows the untruthfulness of the evidence, he must not judge according to it. Moreover, if he has some doubt with regard to the witnesses, he must ask them how they bore such a witness and where they bore it. **Ibnul-Qayyim** (may Allah have mercy on him) said:

> *"...The judge must do this (i.e., to exclude doubted evidence and judge according to the proven ones). Thus, if he deviates from doing this, then he is regarded as committing a sin and turning away from the right judgment. In this regard, it happened that two witnesses testified before 'Ali Ibn Abû Tâlib (may Allah be pleased with him) that a man had stolen something, but 'Ali doubted their testimony. Therefore, he ordered them to cut off the man's hand themselves (to test their truthfulness), so they fled."*[4]

If a litigant claims the invalidation of a witness, he must introduce proof. This is due to the *hadith* in which the Prophet (PBUH) said:

> *"Proof lies on the plaintiff."*[5]

In such a case, such a litigant is to be granted a respite of three days to present his proofs, but if he brings none, then he is judged in consideration with the evidence. That is because his inability to bring a proof that the witnesses are not upright during the specified period is considered a proof of the voidance of what he claims.

If the judge does not know the actual state of the witnesses, he is to ask the plaintiff to prove their uprightness, so as to judge according to what they testify. In order to accept the uprightness of the witness, there should be two persons testifying before the judge that he is just and truthful. However, it is viewed sufficient by some scholars that one person testifies that the witness is upright.

It is permissible to judge an absent person provided that he is far-off for a distance that requires shortening prayers as long as the claim is proved against him. This is due to the *hadith* in which Hind Bint 'Utbah complained to the Prophet (PBUH) saying:

> *"O Messenger of Allah! Abû Sufyân (her husband) is a stingy man and he does not give me what suffices my children and me." The Messenger said to her, "Take what is sufficient for you and your children, and the amount should be just and reasonable."*
>
> (Related by Al-Bukhâri and Muslim)[6]

Hereby, the *hadith* indicates the permissibility of judging against the absent person. Nevertheless, when the absent person returns, he may present his argument before the judge as the reason obstructing the case is eliminated by his return. That is because proving the truthfulness of something does not invalidate the claim against it or neglect it.

When deciding against an absent person, he must be out of the area falling under the authority of the judge. However, if the absent person is in that area and there is no judge therein, the judge is to write to a person fitting to decide among the litigants to judge between them. However, if it is unattainable to do so, then the judge is to write to whoever is fit to effect conciliation between the litigants. But, if it is unattainable to do so, then the judge is to ask the plaintiff to bring a proof substantiating his claim. Therefore, if the plaintiff substantiated his claim with proofs, then the judge is to bring the other litigant even if he is far-off.

In relation to this, Imâm Ahmad mentioned that the opinion adopted by the scholars of Medina stated that they decided cases against the absent persons. He commented on this saying that this is a good opinion. Moreover, **Az-Zarkashî** said, "*Imâm Ahmad did not deny the view of hearing the claim or the evidence (in order to decide against an absent person).*" Besides, Imâm Ahmad cited the opinion of the people of Medina and Iraq as if it was uncontroversial.

In addition to this, it is permissible to listen to the claim against someone who is not legally accountable and then decide according to the proofs. This is supported by the aforementioned *hadith* of Hind Bint `Utbah. If such a person becomes legally accountable after passing a judgment against him, then he has the right to present whatever proofs to substantiate his defense[7].

Endnotes

1 Al-Bukhârî (6967) [12/424] and Muslim (4448) [6/231].
2 Al-Bayhaqî (20537) [10/252].
3 See the footnote in *Ar-Rawd Al-Murbi`* [7/551].
4 See the footnote in *Ar-Rawd Al-Murbi`* [7/552].
5 At-Tirmidhi (1345) [3/626].
6 Al-Bukhârî (5364) [9/628] and Muslim (4452) [6/234].
7 See the footnote in *Ar-Rawd Al-Murbi`* [7/556].

CHAPTER

5

Dividing Shares among Partners

The proofs of dividing shares among partners are derived from the Noble Qur'ân, the *Sunnah* (Prophetic Tradition) and the consensus of Muslim scholars. Allah, Exalted be He, says:

> ***"And inform them that the water is shared between them..."***
>
> (Qur'ân: Al-Qamar: 28)

He also says:

> ***"And when [other] relatives and orphans and the needy are present at the [time of] division..."*** (Qur'ân: An-Nisâ': 8)

Moreover, the Prophet (PBUH) says:

> *"The preemption is applied in every joint undivided property."*[1]

Moreover, he (PBUH) himself used to divide the spoils of war among Muslims[2]. In addition, many scholars maintain that there is consensus among scholars on the issue of division. This is due to the fact that necessity calls for it as there is no other way to give rights of the joint property to those entitled to them except through division.

Division Is of Two Types:

Consensual Division and Compulsory Division

First Type: Consensual Division

It refers to the division that must be implemented with the mutual consent of all partners and it is impermissible to implement it without their mutual consent. For more illustration, it is the kind of division that cannot be implemented without causing harm to one or some of the partners, or that cannot be implemented except when one of the partners gives something in compensation to the other. Such a type may be witnessed in properties such as small houses, shops or lands consisting of different spots distinguished by buildings, trees or the like, or when a certain spot represents a kind of benefit for one of the partners excluding the others. Therefore, it is impermissible to divide such a type of joint properties except with the mutual consent of all the partners. This is due to the *hadith* in which the Prophet (PBUH) says:

> *"One should not harm others nor should one seek benefit for himself by causing harm to others."*
>
> (Related by Imâm Ahmad and other compilers of *Hadîth*)

The general meaning of the *hadîth* indicates that it is impermissible to divide something that may cause harm to any of the partners except with the partners' mutual consent. Such a division takes the same ruling applying to sale transactions. That is, the sold item may be returned if defective. Besides, it involves the option to conclude the contact or cancel it in the session of selling, making conditions, and suchlike matters. Nevertheless, no partner is to be forced to accept such a division. But if one of the partners demands selling the joint item, the one who refuses division is to be obliged to submit, and if he insists on his stand, then the judge may sell the item on their behalf and divide the price between them, each according to his share.

The sort of harm that forbids implementing such a type of division is the undervaluation of the property when divided, regardless of whether the partners benefit from the division or not. That is, it is not included in such harm that the partners do not benefit from the joint property if divided.

Second Type: Compulsory Division

This is when there is no harm caused in dividing a property, and there is no compensation required. It is called so because the judge forces the one who refuses division to accept and implement it when its conditions are fulfilled.

Such a type of division may be concluded in properties such as a village, a garden, big houses and shops, spacious lands, as well as measurable and weighable items from the same kind.

In order to make it permissible to oblige the one abstaining from division to accept it, three conditions must be fulfilled:

1- The judge must make sure of the partners' ownership of the article.
2- He must make sure that there will be no harm resulting from the division.
3- He must make sure of the possibility of dividing the shares of the joint property in a way allowing the shares to be changed without giving compensation to any of the partners in return for this change.

Thus, if one of the partners demands division, after fulfilling these conditions, the other partner is to be forced to implement it even if he refuses to do so. This is based on the fact that division eliminates the harm caused by the existence of partnership, and enables each partner to dispose freely of his own share and benefit from it through planting, building and suchlike matters that are not attainable with the existence of partnership.

With regard to the above issue, if one of the partners is not legally accountable, then his guardian may implement the division on his behalf. Moreover, if one of the partners is absent (for any reason), then the judge may implement the division on his behalf upon the demand of the other partner.

In fact, that type of division is a means of distinguishing the share of one partner from that of the other. Moreover, it does not take the same ruling applied to sale transactions, as each has its own specified rulings.

It is permissible for the partners to divide the joint property by themselves, assign someone to divide it among them, or refer to the judge to assign someone to do so.

As for adjusting the division of the shares, it may be through dividing the joint property into parts, if the property is weighable or measurable and of the same kind. Moreover, just division of shares may be through considering the value of the shares in case the property is of different parts; each having a value different from that of the others. In such a case, the share consisting of parts of less value must be more than the share consisting of parts of higher value, so as to make a kind of balance between them. However, if implementing a just division is not attainable, neither through

dividing the property nor considering the value, then partners may resort to compensation, namely, the one who takes a share of value more than the share of the other partner has to pay him an amount of money equal to the difference in value.

When the partners divide the property among themselves or draw lots for the shares, the division becomes binding. That is because the one who divides the property among them is like the judge and the act of drawing lots on the shares is like the decision made by the judge, so the division becomes binding. It is permissible to draw lots on the shares in any form. However, the most preferable way of drawing lots is the one in which the names of the partners are written on pieces of paper and then they are rolled up and mixed together. Then, the partners may invite a person, who was not present (so he did not see such pieces of paper) and ask him to pick those pieces and put them on the shares. So, whoever finds his name on a certain share, it belongs to him.

Besides, if each partner gives the other the right to choose between shares, the division becomes binding, by means of their consent and by the ending of the session of division without any objection.

Moreover, if one partner claims that there is a mistake in the division they have implemented among themselves, though there are witnesses on their mutual consent, then such a claim is not considered. This is due to the fact that he has already consented to the division according to the way it has been implemented, so he is to accept the increase of the share of the other partner.

In addition, whoever claims that there is a mistake in the division implemented by the person assigned by the judge or the person they have assigned, such a claim is considered only with a proof; otherwise, the other partner is to take an oath denying that claim. The original ruling states that the claim is not true until proven otherwise. Thus, if such a person presents proof substantiating his claim, then it is considered and the division is to be invalidated. This is based on the fact that his silence (i.e., accepting the division) goes back to his view concerning the apparent justice of the person who has implemented the division. So, if the person submits a proof substantiating his claim of the injustice made to his right, he may claim his right back.

Whereas, if each of the two partners claims his right to something in the property, they may resort to taking oaths and the division is to be invalidated. That is because the thing they both claim has not gone to someone other than them, and none of them has a proof to outweigh the claim of the other.

As for the defects that appear in the share of one partner, he has the right to choose between revoking the division or keeping the defective share and taking compensation. That is based on the fact that the defect in the share of any of the partners is regarded as giving him less than his entitled share. Thus, such a person is to be given the choice either to revoke the division or keep it and get compensation, the same as applied in sale transactions. And Allah, Exalted be He, knows best.

Endnotes

1 Muslim (4105) [6/47]. See also Al-Bukhârî (2257) [4/550] and Muslim (4104) [6/46].
2 Muslim (4595) [6/337].

CHAPTER

6

Claim and Evidence

The term "claim" refers to the act of requesting or demanding something. Allah, Exalted be He, says:

> ***"...and for them is whatever they request [or wish]."***
>
> (Qur'ân: Yâsîn: 57)

Jurisprudentially, the term "claim" refers to the act when a person demands something in the possession of another person or in his liability. As for the "evidence," it refers to any sign indicating one's right, such as witnesses and oaths. **Imâm Ibnul-Qayyim** (may Allah have mercy on him) said:

> *"In the Sharî'ah, clear evidence refers to whatever clarifies and manifests any right. Allah, Exalted and Glorified be He, has made rights clear with signs and indications signifying and leading to them. So, whoever ignores those signs and indications in general wastes a lot of rulings as well as rights."*[1]

The difference between the plaintiff and the defendant is that the former is the one who is released when silent (does not claim) while the latter is the one who is not released when silent, as he is claimed against.

In order to decide on the validity of the claim or the denial (defense), each must be from a person who has the freedom of action i.e., he must be a free, major, and legally accountable person.

If two persons claim for a particular property that is already in the possession of one of the litigants, then it belongs to the person who has it, provided that he swears an oath that it is his. In this regard, the litigant who is in full possession of the property is called the "ingoing" while the one who does not possess it is called the "outgoing."

However, if each of the two litigants submits proof that the property is his, the property is to be given to the "outgoing party (i.e., the one who does not possess it)." This is based on the *hadîth* narrated by Ibn 'Abbâs (may Allah be pleased with him), as a *marfû' hadîth*. In this *hadîth*, the Prophet (PBUH) said:

> *"If people were to be given what they claim (without proving their claim), then some people would claim the life and property of other people. The oath is to be taken by the defendant (in the absence of any proof against him)."*
>
> (Related by Imâm Ahmad and Imâm Muslim)[2]

Moreover, the Prophet (PBUH) said:

> *"Proof lies on the plaintiff and the oath is to be sworn by the defendant."*
>
> (Related by At-Tirmidhî)[3]

Thus, the two *hadîths* indicate that the plaintiff is the one who must bring proof substantiating his claim; if he brings it, the decision will be in his favor. They also indicate that the oath is to be taken by the person who denies the claim (the defendant) when the plaintiff does not have proofs substantiating his claim. In this case, the majority of scholars say that the property belongs to the one who already is in full possession of it; the "ingoing party." Those scholars are of the view that the *hadîth* concerns the case in which the one who is in possession of the property does not have a proof; thus, his possession of this property next to the proof will be stronger. It is worth mentioning that the opinion of the majority of scholars has more right to be followed.

However, when the property is in the possession of neither, then each is to swear an oath that it does not belong to the other, and half the property is to be equally divided between them. This is because they are equal in their claims and none of them has proofs to outweigh those of the other. However, if there is an apparent sign indicating that the property belongs to one of them, it is to be considered in the decision. For example, if two spouses litigate over the clothes and suchlike of the house belongings, then whatever fits a man is to be given to the husband and whatever fits a woman is to be given to the wife, and whatever fits both is to be given to both.

Endnotes

1 See the footnote in *"Ar-Rawḍ Al-Murbi'"* [7/576]
2 Muslim (4445) [6/229] and Al-Bukhârî (4552) [8/268].
3 At-Tirmidhî (1345) [3/626].

CHAPTER

7

Testimony

Testimony, in Arabic, refers to seeing, since the witness informs about what he/she has already seen and known. It is a controversial matter among scholars whether the witness should begin his/her testimony with saying, "I testify..." or "I have testified..." or not. In this regard, there are two views; the first is the well-known view maintained by the Hanbali scholars, namely, that it is obligatory to say such words when testifying. The second is one of the views reported to be maintained by Imâm Ahmad and a group of scholars; they maintain that it is not obligatory to begin one's testimony with "I testify..." or the like. This is the same opinion adopted by Imâm Taqiyyud-Dîn Ibn Taymiyah, his disciple Ibnul-Qayyim, and other Muslim scholars.

Shaykhul-Islâm Ibn Taymiyah said:

"It is not a prerequisite of testimony to say 'I testify...' This is the same opinion adopted by Imâm Ahmad and others, and it has not come to my knowledge that there is a contrary legal text in this concern. Furthermore,

none of the Companions of the Prophet (PBUH) or of the Companions' Successors has stipulated saying such words when testifying."[1]

Ibnul-Qayyim says:

"According to the sound view of the majority of Muslim scholars in this regard, informing about what one has witnessed is in fact a testimony. That is to say, it is not a condition for the validity of the testimony to say 'I testify...' Rather, whenever the witness says that he has seen such and such a thing or that he has heard such and such a thing and the like, this is regarded as a valid testimony. In addition, there is no text either in the Glorious Qur'ān or in the Sunnah stipulating that the witness is to say 'I testify' when bearing a testimony. Furthermore, none of the Companions of the Prophet (PBUH) is reported to have stipulated saying so when testifying, nor can it be concluded by means of analogical deduction or inference. Further, the numerous proofs of the Glorious Qur'ān, the Sunnah, the statements of the Companions and the Arabic language assert that it is not required to say such words when testifying."[2]

It is a collective duty to undertake testimony in matters other than the limits set by Allah, Exalted be He. That is to say, if someone assumes the responsibility of testifying, it becomes sufficient and the rest of the Muslims are not to be accountable, since the purpose of testimony has been accomplished. If there is only one person to do so, then it is personally obligatory upon him, in consideration with what Allah, Exalted be He, says:

"...And let not the witnesses refuse when they are called upon..."

(Qur'ān: Al-Baqarah: 282)

That is, if witnesses are asked to assume the responsibility of testifying to what they have witnessed, they are to offer the testimony. The general meaning of the verse implies both assuming the responsibility of testifying and offering the testimony itself. According to Ibn ' Abbās and others, the above-mentioned verse means assuming the responsibility of testifying and declaring testimony in front of a judge (or a court, a deliberative body, or those in authority). Since necessity requires legal testimony for confirming the rights of people and the concluded contracts, testifying becomes an obligation like enjoining what is right and forbidding what is wrong.

As for declaring testimony, it is an individual duty on whomever undertakes it, and is asked to testify, in consideration of what Allah, Exalted be He, says:

> ***"...And do not conceal testimony, for whoever conceals it – his heart is indeed sinful..."*** (Qur'ân: Al-Baqarah: 283)

That is, when one is asked to testify of what one has witnessed, one is not to conceal testimony nor overstate in declaring it, since Allah says, ***"...for whoever conceals it - his heart is indeed sinful..."*** That is to say, the heart of the one concealing testimony is wicked; a severe divine threat of turning one's heart into a wicked disfigured one. Allah mentions the heart in particular since it is the position acquainted with what one has witnessed. The above verse signifies that testifying is an individual duty upon whoever witnesses an event whenever he/she is asked to testify.

The great scholar **Ibnul-Qayyim** (may Allah have mercy on him) says, *"Undertaking and declaring testimony are an obligation the nonperformance of which is a sin."* He adds:

> *"...By means of analogical deduction of the view maintained by the Hanbalî scholars in this concern, if the witness conceals his testimony (i.e., refuses to undertake or declare testimony) concerning any right, he is to redress this right in the form of a fine. This is because he has been able to give the right to whom it is due (by declaring testimony) but refrained. It is as if one has had the opportunity to save a person from a dangerous situation, yet one has not done so..."*[3]

If there is no harm on the side of the witness (because of declaring testimony), it then becomes obligatory upon him to testify. However, if testimony will cause harm to him personally or to his sense of honor, property or family, in this case, it is not obligatory upon him. This is according to what Allah, Exalted be He, says:

> ***"...Let no scribe be harmed or any witness..."***
> (Qur'ân: Al-Baqarah: 282)

This also is demonstrated in the *hadîth* in which the Prophet (PBUH) says:

> *"One should not harm others nor should he seek benefit for himself by causing harm to others."*

And Allah, Exalted be He, knows best.

The witness must be certain about the matter concerning which he is to testify. It is prohibited for the witness to testify to having witnessed anything except what he/she knows with certainty (by seeing or hearing for example), in consideration to what Allah, Exalted be He, says:

"And do not pursue that of which you have no knowledge..."
(Qur'ân: Al-Isrâ': 36)

And His statement:

"...but only those who testify to the truth [can benefit], and they know." (Qur'ân: Az-Zukhruf: 36)

That is, the witness must be wholly certain regarding what he/she is to testify. In this connection, Ibn `Abbâs (may Allah be pleased with him) narrated:

"When the Prophet (PBUH) was asked about testimony, he said to the inquirer, 'Do you see the sun?' The man replied in the affirmative. He (PBUH) then said, 'So testify like this or leave it (i.e., be wholly certain regarding what you are testifying the same as you are certain of seeing the sun, or do not testify).' "

This narration is related by Al-Khallâl in his book entitled *Al-Jâmi`* (*The Collection*)[4]. **Al-Bayhaqî** says, *"This narration is not narrated by a reliable chain of transmitters."* However, **Al-Hâfiz Ibn Hajar** says commenting on this *hadîth*, *"...But the meaning of the hadîth stated in this narration is correct."*

To illustrate, knowledge about the matter, regarding which one is to testify, should be based either upon hearing it or upon seeing it. Thereby, one is not to testify to having witnessed anything except what one knows with certainty by way of seeing or hearing, or through hearing about an issue which is a public event discussed among people and which is difficult to know except in this way, as in cases like relationships by marriage and death (of a person). However, one is not to offer testimony depending upon hearing about an issue discussed among people except when it comes to one's knowledge through a number of people enough to prove the certainty of such matter.

There are six conditions to be fulfilled by the one who is to deliver testimony:

1- **Reaching puberty:** Testimony is not acceptable from children except when it concerns matters relating to them. In this concern, the great scholar **Ibnul-Qayyim** says:

"The Companions of the Prophet (PBUH) and the faqihs of Medina used to accept the testimony of children when it is related to quarrels occurring amongst them. This is because men are not typically present at such situations. If the testimony of those children were not to be

acceptable in such situations, people's rights would be lost, unfulfilled and thus disregarded, especially when their testimony is more probable to be truthful or reliably truthful. This is as in cases such as when they come directly, without going to their homes, to testify to an incident they have witnessed, agree on the same information and are separated at the time of delivering the testimony. When their testimony is identical in such a case, their testimony is considered more reliable than that of two men. This is a view that cannot be denied or refused..."[5]

2- **Sanity:** The testimony of the insane or the foolish person is not acceptable. As for the one who sometimes loses consciousness, his testimony is acceptable when he regains consciousness and assumes the responsibility of testifying. This is because in his consciousness, it is a testimony from a sane person who resembles a person who has not lost his mind.

3- **The Ability to Speak:** The testimony of the mute is not acceptable even if his signs and gestures are understandable, since certainty must be fulfilled in testimony. The signs of the mute, in spite of that, are effective and sufficient in rulings pertaining to his affairs such as marriage and divorce, for necessity. However, if such a person writes his testimony, it is then acceptable, for writing is suggestive of speech (i.e., what he cannot say can be written).

4- **Being a Muslim:** A witness must be a Muslim according to the verse in which Allah, Exalted be He, says:

"...And bring to witness two just men from among you..."

(Qur'ân: At-Talâq: 2)

Thus, the testimony of a disbeliever is unacceptable except when being a witness to a will at the time of bequest when one is traveling and is about to die. Only in this case the testimony of two disbelievers are acceptable when there are no Muslims, in consideration to what Allah, Exalted be He, says:

"O you who have believed, testimony [should be taken] among you when death approaches one of you at the time of bequest - [that of] two just men from among you or two others from outside if you are traveling through the land and the disaster of death should strike you..." (Qur'ân: Al-Mâ'idah: 106)

The testimony of two disbelievers is legalized for necessity only in this case.

5- **Having a Good Memory:** The testimony of a foolish or a forgetful person is not acceptable, since it is known that such a person makes many mistakes and usually forgets, and because he is unreliable in telling the truth. Besides, whatever he says is thought to be incorrect since it may be one of his mistakes. Yet, testimony is acceptable from the person who makes fewer mistakes and does not usually forget, since none is free from both defects.

6- **Uprightness:** Jurisprudentially speaking, the term "uprightness" refers to one's righteousness and moderateness whatever one says or does. What proves that uprightness is one of the conditions of testimony is what Allah, Exalted be He, says in the Glorious Qur'ân:

"...from those whom you accept as witnesses..."

(Qur'ân: Al-Baqarah: 282)

And:

"...And bring to witness two just men from among you..."

(Qur'ân: At-Talâq: 2)

The majority of Muslim scholars maintain that uprightness is an additional characteristic to being a Muslim. A just and upright Muslim is the one who abides by the religious obligations and acts of worship, observes the desirable deeds, and keeps away from committing the prohibited and the detestable ones. In this regard, **Shaykhul-Islâm Ibn Taymiyah** (may Allah have mercy on him) says, "*The faqihs uniformly agree that the testimony of the one known to be untruthful is rejected.*"[6] **Ibn Taymiyah** also adds:

"*...The concept of uprightness is valued according to each age, place and people. Thus, a witness must be an upright person according to his own people, though the uprightness of the same person may be viewed differently by other people (though still considered uprightness). This is how judgments can be conducted among people; otherwise, if testimony is restricted to those witnesses who establish the religious obligations and abandon the prohibited matters, as has been done by the Prophet's Companions, then all the testimonies or most of them would be invalid.*"[7]

Ibn Taymiyah goes on saying:

"*...It is advisable to accept the testimony of those known to be outwardly truthful in cases of necessity even if they do not observe the limits set by Allah. Thus, their testimony may be accepted in cases related to imprisonment, incidents among Bedouins or in villages where there are no upright witnesses.*"[8]

Faqihs (may Allah have mercy on them) maintain that one's uprightness is known by two things, the first of which is performing the religious obligations: the Five Obligatory Prayers and *Al-Jumu`ah* (Friday) Prayer along with their stressed supererogatory practices. Thereupon, the testimony of the one regularly neglecting these prayers and the *Witr* Prayer[9] is unacceptable. Concerning the one who persists in abandoning the supererogatory acts of prayer, **Imâm Ahmad** (may Allah have mercy on him) says, "*...Such a person is a wicked one, for his persistence makes him a non-observant of the Sunnah (out of reluctance), and so he is always blamable.*"[10] Uprightness is also considered through avoiding prohibited acts, the same as it is considered through observing religious obligations. Thus, such an upright person should not commit the major sins nor persist in committing a minor one.

Furthermore, Allah has forbidden Muslims from accepting the testimony of the slanderer (the one who accuses a chaste person of committing adultery or fornication without producing four witnesses). Likewise, by means of analogical deduction, every one who has committed a major sin is to be treated the same as the slanderer. Jurisprudentially, a major sin is the crime which deserves executing a prescribed punishment in this world or is severely threatened against (in the Qur'ân or the *Sunnah*) with a punishment in the Hereafter. These sins are like taking usury, delivering a false testimony, *zinâ* (adultery or fornication), robbery, drinking intoxicants and other sins. Thereby, the testimony of the defiantly disobedient person is unacceptable.

The second sign by which one's uprightness is known is respectability, namely observing the good deeds and having the traits that beautify and adorn one's character and conduct, such as generosity, good manners, and neighborliness. It also involves avoiding whatever may dishonor oneself of the ignominious and ignoble things, such as singing and comic acting. In this concern, **Shaykhul-Islâm Ibn Taymiyah** says, "*...It is forbidden to imitate people sarcastically, and whoever does so, or*

orders someone to do so, is to undergo discretionary punishment, since it is a harmful act."[1] By means of analogical deduction, this applies to the TV series presented nowadays. How strange is it to consider singing nowadays as an art whose performers are supported and praised! And there is neither might nor power except in Allah!

Whenever these afore-said impediments preventing the acceptability of the testimony cease to exist, the testimony becomes acceptable. Hence, when the child reaches puberty, the insane person regains sanity, the disbeliever embraces Islam and the defiantly disobedient person repents, the testimony of any of them is to be accepted. This is because there are no impediments as the conditions of the testimony are fulfilled. And Allah, Exalted be He, knows best.

The testimony of the following is (legally) unacceptable:

- A person testifying in favor of his parents and forefathers and on up in ascending lineage or in favor of his offspring and on down in descending lineage. This is because one's testimony then is doubtful due to being a relative of the litigant one testifies for. However, testimony is acceptable from a brother for his brother and from a friend for his friend according to the general meaning of the verses related to such an issue and since testimony then is not doubtful.

- The testimony of a spouse for the other is unacceptable, for each of them is already obtaining benefit from the other's property, and also because of the close relationship combining both; all this makes their testimony in favor of each other doubtful. However, testimony at the same time is acceptable against one's spouse, in consideration to what Allah, Exalted be He, says,

  "...be persistently standing firm in justice, witnesses for Allah, even if it be against yourselves or parents and relatives..."

  (Qur'ān: An-Nisā': 135)

  That is to say, if one testifies against one's parent, child, wife or the latter testifies against her husband, the testimony in this case is acceptable.

- The testimony of a person that may get him some benefit or spare him some harm is unacceptable.

- The testimony of a person against his enemy is unacceptable. In this

regard, the great scholar **Ibnul-Qayyim** says:

"The Sharî`ah has decreed that testimony is unacceptable when born by someone against his/her enemy, lest testimony be used as a pretext to gain benefit or avenge oneself from one's enemy through perjury..."[12]

Animosity which renders one's testimony unacceptable is the case of being happy when another person is in adversity or sorrow, or unhappy when he is in prosperity or joy. It is worth mentioning that the animosity meant here is the worldly one, unlike animosity in religion; thereby the testimony of a believer against a disbeliever is acceptable. Likewise, the testimony of one following the *Sunnah* against an innovator in religion is acceptable, since Islam enjoins Muslims not to commit whatever is prohibited.

- In addition, the testimony of a person known to be a bigot and of extreme zealotry for his clan is not to be accepted, since his testimony will then be doubtful.

The number of witnesses differs according to the case or issue testified in

If testimony concerns a case of *zinâ* (adultery or fornication) or sodomy, it is not accepted unless there are four male witnesses, as Allah, Exalted be He, says:

> ***"... Why did they [who slandered] not produce for it four witnesses?..."*** (Qur'ân: An-Nûr: 13)

Since Muslims are ordered to conceal the faults of their Muslim brothers and so the faults of those committing any of those sins, the number of witnesses is four males.

When testimony concerns proving the insolvency of a person known to be wealthy but claiming the opposite, then it requires three male witnesses, according to the *hadîth* related by Imâm Muslim in which the Prophet (PBUH) says:

> *"...until three wise persons from amongst his people witness that so and so (i.e. that person) has been smitten by poverty."*[13]

If testimony concerns the prescribed punishments for crimes other than *zinâ*, such as the prescribed punishment for slander, drinking intoxicants, robbery and banditry, or if it concerns *qisâs* (legal retribution), then it is valid to accept the testimony of only two male witnesses. Also, in such cases, women's testimony is unacceptable.

If testimony concerns matters other than the prescribed punishments or financial affairs, which men often see or witness, such as marriage, divorce or remarriage to one's revocably divorced wife, then two male witnesses may testify. Shaykhul-Islâm Ibn Taymiyah and his disciple Ibnul-Qayyim (may Allah have mercy on them both) maintain that if testimony concerns remarriage with one's revocably divorced wife, then women's testimony is acceptable, since it is easier for them to be present at that time than at the time of writing the documents (i.e., marriage or divorce contracts).

If testimony concerns properties and transactions related thereof, such as sales, renting and the like, then two men or a man and two women are to testify, for Allah, Exalted be He, says:

> ***"...And bring to witness two witnesses from among your men. And if there are not two men [available], then a man and two women..."***
>
> (Qur'ân: Al-Baqarah: 282)

The context of this verse signifies that testimony here concerns financial affairs. The great Muslim scholar **Ibnul-Qayyim** (may Allah have mercy on him) says:

> *"Muslim scholars uniformly agree that if testimony concerns financial affairs, then a man and two women are sufficient as witnesses. The same applies to transactions related to financial affairs, such as sales, sales on credit, the choice to conclude a sale or to cancel it, mortgages, granting properties through wills, gifts or endowments. This also applies to the cases of guaranteeing a property or spoiling it, the claim of slavery of one of unknown lineage, defining the amount of dowry or the recompense of Khul' (a wife's release for payment)."*[14]

The wisdom behind accepting the testimony of women in financial affairs – Allah, Exalted be He, knows best – is that in such transactions both men and women often witness them; thereupon, the *Shari'ah* allows men and women to testify in such affairs.

Allah, Exalted be He, has stated that a man's share equals that of two women in many rulings, such as testimony, inheritance, *diyah* (blood money), slaughtering for a newborn child, and emancipation. Allah, Exalted be He, has demonstrated the wisdom behind this in His statement in the Glorious Qur'ân:

> ***"...so that if one of them [i.e., the women] errs, then the other can remind her..."*** (Qur'ân: Al-Baqarah: 282)

That is, if either of the two female witnesses forgets (any of the details of what she has witnessed), the other woman may remind her. This is because

women, by nature, tend to forget, which renders the testimony of two women equal to that of one man. Yet, if the testimony of a woman were to be wholly unacceptable, this would lead to wasting many rights and rendering them ineffective. That is why a woman's testimony is added to that of another woman to remind each other in case any of them forgets.

Besides, if testimony concerns financial affairs, it is sufficient for the plaintiff to have a male witness together with taking an oath. This is based on the *hadith* in which Ibn `Abbâs (may Allah be pleased with him) said:

> *"The Messenger of Allah (PBUH) decreed that testimony (concerning cases involving financial affairs) is acceptable of a male witness together with the oath of the plaintiff."*
>
> (Related by Imâm Ahmad and other compilers of *Hdîth*)[15]

In this concern, **Imâm Ahmad** (may Allah have mercy on him) said, "*It is stated in the Sunnah that a judgment can be based on the testimony of a male witness along with the oath of the plaintiff.*"

In this connection, **Ibnul-Qayyim** said:

> *"...This ruling (accepting the testimony of a male witness along with the oath of the plaintiff in financial affairs) does not contradict the hadîth in which the Prophet (PBUH) says, "The oath is to be sworn by the defendant."[16] What is actually meant here is that if the plaintiff does not have any witnesses or proofs substantiating his claim, then the case is not to be decided in his favor. However, if the plaintiff has an upright witness or the like, the case is not to be decided in his favor unless he is to introduce a male witness, to support his claim, along with taking an oath..."*

If testimony concerns things that men do not often see or witness, such as concealed female defects, virginity, being deflowered, menstruation, childbirth, breastfeeding, participating in the childbirth and the like, the testimony of an upright woman is acceptable. This is according to the *hadîth* narrated by Hudhayfah (may Allah be pleased with him) who said:

> *"The Prophet (PBUH) accepted the testimony of a midwife."*
>
> (Related by Ad-Dâraqutnî and other compilers of *Hadîth*)[17]

Yet, some scholars have viewed that this *hadîth* has a weak chain of transmitters. It is worth mentioning that it is stated in the Two *Sahîhs*[18] that the Prophet (PBUH) accepted the testimony of one woman in rulings pertaining to breastfeeding.

Endnotes

1 See "*Al-Ikhtiyârât Al-Fiqhiyyah*" [pp. 522-523].
2 See the footnote in *Ar-Rawd Al-Murbi'* [7/580].
3 See the footnote in *Ar-Rawd Al-Murbi'* [7/581].
4 Al-Hâkim (7124) [198] and Al-Bayhaqî (20579) [10/263].
5 See the footnote in *Ar-Rawd Al-Murbi'* [7/591].
6 See *'Majmû'ul-Fatâwâ'* (15/356).
7 See the footnote in *Ar-Rawd Al-Murbi'* [7/593-594].
8 See *'Majmû'ul-Fatâwâ'* (15/356).
9 The *Witr* Prayer: A supererogatory prayer consisting of an odd number of *rak'ahs* [one, three, five, seven, nine, eleven or thirteen] and it is performed any time between the *'Ishâ'* (Night) and the *Fajr* (Dawn) Prayers.
10 See the footnote in *Ar-Rawd Al-Murbi'* [7/594].
11 See "*Al-Ikhtiyârât*" (p. 358).
12 See the footnote in *Ar-Rawd Al-Murbi'* [7/604].
13 Muslim (2401) [4/134].
14 See the footnote in *Ar-Rawd Al-Murbi'* [7/611].
15 Muslim (4447) [6/230], Abû Dâwûd (3608) [4/24], Ibn Mâjah (2370) [3/122]. See also At-Tirmidhî (1347) [3/627].
16 Muslim (4445) [6/229] and Al-Bukhârî (4552) [8/268].
17 Ad-Dâraqutnî (4510) [4/149] and Al-Bayhaqi (20542) [10/254].
18 Al-Bukhârî (88) [1/243].

CHAPTER

8

Letters among Judges, Testifying to Testimony, and Taking Back Testimony

A judge may send a letter for another judge if necessary; for example, a person may be living in another town other than his and he has a right that he cannot substantiate or claim except in front of the judge of his town. In this case, the judge of the town where he lives is allowed to send a letter to that of the other town to complete legal procedures. That is because it may be difficult for witnesses to travel; besides, they may be known (concerning their uprightness) in a town but not in the other. Due to the above, it would be difficult to substantiate one's right or claim without a letter sent from a judge to another.

Muslim scholars uniformly agree upon accepting the letter sent from a judge to another for proving and establishing rights. In this connection, Prophet Sulaymân (Solomon) (PBUH) sent a letter to Bilqis;[1] the Prophet (PBUH) also sent letters to An-Najâshi (Negus, King of Abyssinia), Qayşar (Caesar,

the Roman emperor) and to Kisrâ (Khosrau, King of Persia) inviting them all to embrace Islam. He (PBUH) used to send letters to Muslim governors in Islamic countries as recurrently related in many *hadiths*. All the above prove the legality of sending letters among judges for proving rights and the like.

It is worth mentioning here that the letter sent from a judge to another is acceptable when related to people's rights and is unacceptable in cases of the limits set by Allah (i.e., prescribed punishments), such as the prescribed punishments for committing *zinâ* (adultery or fornication) and drinking intoxicants. This is based on the fact that such divine limits are Allah's rights which are based upon concealing the fault of those violating any of them and their prescribed punishments are not to be applied on suspicious proofs.

The letter sent by a judge to another is one of two types:

- The first type: The letter sent by a judge including a judgment of his to be effected by his counterpart. In this case, the letter is acceptable even if the two judges are in the same town, since the judgment of a judge is to be applied whatever the case may be; otherwise, judgments would be suspended and disputes would increase.
- The second type: The letter including whatever the sending judge has proved and substantiated to be taken as evidence in giving the judgment by his counterpart. It is stipulated, however, that the distance between the two judges is equal to or more than the distance that entails shortening prayer. That is because it is an act of transferring a written testimony to the receiver, his counterpart; thereby, it is impermissible when the distance between the sending judge and the receiving one is close.

The wording of substantiation may be as follows: "It has been proved to me that so and so owes so and so such and such a right." However, substantiation is not a judgment; it is rather informing the other judge about what has been proved.

In this connection, **Sheikh 'Abdur-Rahmân Ibn Qâsim** says:

> *"It is permissible to send a letter to a judge containing what has been proved to another judge when the distance between both is equal to or more than the distance that entails shortening prayer, even if the sender views that it is impermissible to issue a judgment on the basis of what has been proved to him. This is because he only informs the receiving judge about what is proved and the latter may issue his judgment according to what has been proved if he views such proofs as valid."*[2]

Furthermore, it is permissible for a judge to send a letter to an unspecified judge; the wording may be as follows: "To whomever receives my letter of the Muslim judges," without specifying a certain person. Whatever judge receives such a letter has to accept it since it is sent from a judge to another judge. Thus, it is the same as the case when the letter is sent to a certain judge.

There are two views concerning the acceptability of the letter sent to another judge. The first view is that the judge must call two upright witnesses to testify to it. Those two witnesses are to define its meaning and the rulings related to what it includes. The second view is that it is permissible to act upon a letter sent from a judge to another when the receiving one knows the handwriting of the sending judge, even if there are no witnesses. This is one of the views reported to be adopted by Imâm Ahmad. However, at the present time, the formal seal of the court is sufficient and takes the place of witnesses.

In this regard, **Imâm Ibnul-Qayyim** (may Allah have mercy on him) says:

> *"The Prophet's Companions have uniformly agreed upon acting according to matters proved and recorded in a letter sent to one another. The same has been observed by the Muslim Caliphs. It is well-known that people always depend on what is included in manuscripts and letters; if they were not to act upon what those writings include, the laws of Sharî'ah (Islamic Law) would not be in effect."*

Imâm Ibnul-Qayyim adds:

> *"...Muslim caliphs, judges, rulers and governors have been acting upon letters they used to send to each other. They would not inform persons carrying such letters about the content they included nor read them in their presence. This is the way according to which people used to behave during the lifetime of the Prophet (PBUH) until present."*

Ibnul-Qayyim goes on saying:

> *"...The purpose intended here is that the judge receiving the letter must be certain of the person who has written it. If the handwriting is known with certainty that it is of a certain person, it becomes the same as ascribing a certain speech to him. Allah, Exalted be He, has made a distinction between every scribe's handwriting from that of the other, the same as everyone's form is distinguished from others'. Besides, witnesses may declare undoubted testimony based on that a certain handwriting is certainly of so and so..."*[3]

Sheikh Taqiyyud-Dîn Ibn Taymiyah (may Allah have mercy on him) says:

"*...And whose handwriting is recognized by way of confession, style of writing or a testimony, should be acted upon...*"[4]

As for testifying to a testimony, it refers to a case when someone asks another to testify to the testimony of the former. He may say, "Testify to my testimony that...," or "Testify that I bear witness that..." and the like. It, in fact, bears the meaning of representation where the first witness is referred to as the original witness and the other as the secondary witness. In this regard, **Abû 'Ubayd** said, "*Muslim scholars from the people of Hejaz*[5] *and Iraq uniformly agree on accepting the testifying to a testimony in cases related to financial affairs.*" **Imâm Ahmad** was asked about testifying to a testimony, and he replied saying, "*...It is permissible.*" Necessity, in fact, requires accepting testifying to a testimony. If it were unacceptable, testimony would not be in effect and judgments would be suspended. In addition, in some cases, some proofs may be established late or witnesses may die before testifying, which causes harm to people and is considered a severe difficulty. This is why it is obligatory to accept testifying to a testimony the same as the original testimony is accepted.

To accept testifying to a testimony, there are many conditions that must be fulfilled:

First: The original witness must give permission to the secondary witness to testify to his testimony, since testifying to one's testimony means representation that is to be done only with one's permission.

Second: Testifying to a testimony must be in cases where it is permissible that a judge sends to another as mentioned before, namely, in cases where people's rights rather than Allah's limits are concerned.

Third: When the testimony of the original witness is unattainable because of his death, illness, absence in a place far away, fear of a ruler and the like.

Fourth: The circumstances hindering the testimony of the original witness continue until giving the judgment.

Fifth: Both the original and the representative witnesses must be characterized by uprightness until the judgment is issued.

Six: The representative witness must declare the identity of the original witness on whose behalf he is assuming the responsibility of testifying.

As for the rulings on taking back one's testimony, they are as follows:

- If the witnesses in cases pertaining to financial affairs take back their testimony, the judgment does not become null, since it has been already issued; besides, the plaintiff has become entitled to take what has been testified to belong to him. However, the witnesses are accused of trying to nullify the judgment, so the judgment is to take effect and the witnesses are to be fined the equivalent of what they testified to, since they thus unlawfully deprived the real owner of his rightful property.
- If the judge gives a judgment according to the testimony of a witness and an oath (taken by the plaintiff), and the witness takes back his testimony, the witness is to guarantee the whole property in dispute, for the whole claim is based on his testimony. Moreover, the oath is to be taken by the plaintiff and it is not necessarily acceptable against the other party (as proof), since it is only one of the conditions for giving the judgment.
- If the witnesses take back their testimonies before the judgment is issued, the judgment is to be cancelled and the witnesses are not accountable for guaranteeing any thing. And Allah, Exalted be He, knows best.

Endnotes

1 Bilqis; also Balkis: The Queen of Saba' (Sheba; a place in Yemen); she ruled during the lifetime of Prophet Sulaymân (Solomon), and she and her people used to worship the sun.
2 See the footnote in "*Ar-Rawd Al-Murbi'* " [7/560].
3 See the footnote in "*Ar-Rawd Al-Murbi'* " [7/561-562].
4 See "*Majmû`ul Fatâwâ*" [35/66, 428].
5 Hejaz (Hijaz): A region of northwest Saudi Arabia on the Gulf of Aqaba and the Red Sea. It includes the sacred cities of Mecca and Medina.

CHAPTER

9

Oaths in Claims

Taking an oath is one of the legal procedures, for the Prophet (PBUH) said:

"*...The oath is to be sworn by the defendant.*"[1]

Thereby, the oath is to be taken by the defendant if the plaintiff does not have any proof against him. The oath does end the dispute but does not annul the plaintiff's right. That is to say, if the plaintiff establishes evidence after the case is ended, his proof is to be taken in consideration and the judgment is to be in his favor. Likewise, if the defendant takes back his oath and returns whatever right he owes to the plaintiff, it is then considered acceptable and it is permissible for the plaintiff to take what he claims to be his.

Oaths are to be specifically sworn concerning people's rights, which is not the case concerning the rights of Allah, Exalted be He, such as the acts of worship, and the prescribed punishments. If a Muslim says, "I have already paid the *Zakâh* due on me," or "There is no atonement or expiation due on me," this is acceptable from him, and he is not to be asked to take an oath. The

same goes for a Muslim who denies transgressing the limits set by Allah; he is not to be asked to take an oath, since it is desirable to conceal people's faults. Besides, if someone confesses transgressing a divine limit, then takes back his confession, this is to be acceptable from him and he is to be released. Thus, it is worthier not to ask such a person to take an oath without having confessed.

- Taking an oath is worthless in claims relating to people's rights, except when the judge orders the defendant to swear upon the request of the plaintiff. In this case, the oath is to be in the form of an answer to the plaintiff.
- Taking an oath is to be done in the assembly of the judge.
- An oath is valid only if sworn by Allah, Exalted be He, since taking an oath by other than Allah is an act of polytheism.
- When taking an oath by Allah, it is sufficient to say, "By Allah..." which suffices as an oath. Taking an oath with these words has been mentioned in many positions in the Glorious Qur'ān. Allah, Exalted be He, says:

  "...And they swear by Allah their strongest oaths..."

  (Qur'ān: Al-An`ām: 109)

  And He says:

  "...and let them both swear by Allah..."

  (Qur'ān: Al-Mā'idah: 106)

  He also says:

  "...four testimonies [swearing] by Allah..."

  (Qur'ān: An-Nûr: 6)

  Besides, the word "Allah" is a proper name which indicates one of the Best Names attributed to none but Him, Exalted be He.

- A solemn oath is only taken concerning matters of great importance, such as a crime that does not necessitate legal retribution or emancipating a slave (at the time of slavery). In such cases, the judge may ask the defendant to swear a solemn oath, such as saying: "By Allah, other than Whom there is no deity, the Knower of the unseen and the witnessed, the Predominant, the Harm-Inflicting, the Benefit-Giver and the Knower of that which deceives the eyes and what the breasts conceal.

- In case one owes a right to a group of people, one is to take an oath for each, for each of them has a right upon the one, which is regarded as separate and different from the other's right. However, the defendant is to take only one oath in case those people agree upon that, which then is sufficient, for they have agreed to disclaim their own right.

Endnotes

1 At-Tirmidhi (1345) [3/626].

CHAPTER

10

Confession

Jurisprudentially, confession refers to acknowledging that one owes a right to someone else. In fact, confession is just an act of acknowledging rights which one owes others; it does not establish a new right. In this concern, **Sheikh Taqiyyud-Din Ibn Taymiyah** (may Allah have mercy on him) said:

> *"If someone informs (a person) about what he owes others, then he is a confessor, and if he informs (a person) about what others owe him, then he is a plaintiff. In case someone informs about rights which a person owes others, while he is entrusted with such rights, he thus is regarded as a mere reporter. However, if he is not entrusted with such rights, he then is regarded as a witness. The judge, the agent, the scribe, the guardian and the authorized person, are all entrusted with whatever jobs they perform. However, if they are dismissed from their offices and inform about what they knew, this is not considered a confession, it is rather informing."*[1]

Ibn Taymiyah then adds"

> "...*Confession does not establish a new right; rather it brings right into light and informs people about what one owes others.*"

- There are many conditions that must be fulfilled to make the confession valid, one of which is that it is valid when the confessor is legally accountable. Hence, it is not valid when made by a child, an insane person or a sleeping person. However, confession is acceptable, and legally binding, from a minor provided that it must be within the limits specified for him in commercial affairs.
- Also, confession must be made with one's free will. That is, confession is not acceptable when one is forced, except when confessing to a thing other than what one has been forced to confess to.
- Moreover, confession is not valid when the confessor is interdicted; the confession of a weak-minded person is not legally valid.
- Confession is not to be made to a thing in other people's possession or under other people's guardianship, as in cases where a stranger confesses (claims) the paternity of a child or confesses to an endowment which belongs to another person or is under someone else's guardianship.
- If the confessor claims that he has confessed involuntarily, this is accepted from him provided that he introduces a proof substantiating what he claims.
- The confession of a sick person that a property belongs to any one other than the legal heirs is legally binding, since he is not suspected of showing favoritism. Moreover, when one is sick, one is keen to return whatever rights one owes others.
- If someone claims that another person owes him something and the respondent acknowledges this person's claim, the respondent's acknowledgement is acceptable and binding as well, and it is regarded as a confession which he is bound to. This is according to the *hadith* of the Prophet (PBUH) in which he said:

  "*There is no excuse for the one who confesses.*"[2]

- Confession is valid and legally binding when declared with any wording indicating confession. For example, the respondent may say (to the plaintiff), "You have told the truth," or "Yes," (as a confirmation to his claim) or "I confess to that."

- It is valid to exclude half or less of the total amount (or whatever one owes another) when confessing. That is to say when one confesses that he owes someone ten (of such and such a thing) except five of it, he is bound to give him five. The style of exclusion is used at many positions in the Glorious Qur'ân; Allah, Exalted be He, says,

  "...and he remained among them a thousand years minus fifty years..." (Qur'ân: Al-'Ankabût: 14)

  In addition, many scholars maintain that it is permissible for the confessor to exclude more than half.

- To be valid, exclusion in confession must be said nonstop. If the confessor says, "I owe so-and-so one hundred (of an article, for example)," then he pauses though he can continue, then he says, "profitless" or "on credit," the confessor then is bound to give him one saleable hundred on the spot. Besides, whatever the confessor says after his pause is not to be taken into consideration, since he thus tries to remove a right which is already binding on him.

- If someone sells something or gives it as a gift, and then he confesses that this thing belongs to someone else, his confession is not to be accepted. Moreover, neither the sale nor any other transaction related to this property becomes null, since he confesses to something that belongs to someone else. In addition to this, the confessor is to pay the value of the object to the original owner in compensation, since the latter has been deprived of his rightful property.

- Confession is valid and legally binding when it concerns a thing the confessor does not exactly specify, which could be interpreted in two ways or more, all being the same for the confessor.

- If a person confesses saying, "I owe so-and-so such and such a thing," his confession is valid and legally binding. Yet he is to be asked to explain what he intended and make himself clear so as to be liable for it. In case the confessor refuses to point out what he intended, he is to be put under arrest until he points out what he intended. This is because the confessor must make clear what he has intended to say, for it is a right that he has to clarify and give to its owner. If the confessor denies knowing the object to which he has confessed, he is to take an oath confirming that. Besides, he is to pay to its owner a fine equal to the least value of that object. If the confessor dies before explaining what he has intended, his heirs are not to be responsible for giving it to

its owner, even if the confessor has left an estate, for that thing might be something other than a property.

- If someone says, "I owe so and so a sum less than one thousand," it is to be interpreted as having intended what is less than the half.
- If someone says, for example, "I owe so and so an amount between one dirham and ten," he is to give eight dirhams to the owner since this is the meaning he has intended; eight is the number between one and ten.
- If someone says, "I owe so and so an amount from one dirham to ten," one is to give nine dirhams to the owner, for the maximum number (which is ten here) is not included in what is intended by the confessor. Besides, some scholars maintain that if the extreme limit is of the same kind of the thing intended, it is to be considered a part of the total; otherwise, it is not to be included.
- If someone confesses saying, "The space between this wall and the other wall belongs to so and so," the two walls are not to be included, for he only has confessed to whatever is between them.
- If someone confesses that a tree or some trees belong to someone else, his confession does not include the land. Thus, neither the rightful owner of the trees has the right to replant them in case they are removed nor does the owner of the land have the right to remove them. This is because it is obvious that the trees have been rightfully planted.
- If someone confesses that a garden belongs to someone else, his confession includes the trees, the buildings and the land, since the garden refers to all these things.
- If someone confesses owing someone some dates in a bag, a knife in a sheath, or a garment in a wrapping, his confession includes the enveloped object (the dates, the knife or the garment) rather than the envelope (the bag, sheath, or the wrapping). This is because the enveloped object and the envelope are not the same, for the former does not completely absorb the latter. Besides, the enveloped object and the envelope do not necessarily belong to one person, and confession is not binding in probable cases where there may be more than one owner of the object.
- If someone confesses saying, "I and so-and-so share the ownership of such and such an object," he is to determine the share of his partner. Some scholars maintain that in such cases each partner is considered

as having an equal share according to the general rule stating that "the partnership in general entails having equal shares". Allah, Exalted be He, says:

"...they share a third..." (Qur'ân: An-Nisâ': 12)

If anyone owes any right to others, he must make a confession stating that when necessary. Allah, Exalted be He, says:

"O you who have believed, be persistently standing firm in justice, witnesses for Allah, even if it be against yourselves..." (Qur'ân: An-Nisâ': 135)

And He says:

"...and let the one who has the obligation [i.e., the debtor] dictate. And let him fear Allah, his Lord, and not leave anything out of it. But if the one who has the obligation is of limited understanding or weak or unable to dictate himself, then let his guardian dictate in justice..." (Qur'ân: Al-Baqarah: 282)

In this regard, in his book entitled *Al-Kâfî* (*The Sufficient*), **Al-Muwaffaq** said:

"...Dictation in this verse means confession, and the judgment must be issued according to the confession, for the Prophet (PBUH) has said, '...O Unays! Go to the wife of this (man) and if she confesses (that she has committed adultery), then stone her to death.'[5] Besides, he (PBUH) ordered that Mâ'iz and Al-Ghâmidiyyah (a woman from the tribe of Ghâmid) be stoned to death after confessing that they had committed adultery (in two separate cases). Moreover, since a judgment must be given according to the substantiated proofs, then it is worthier to be given by virtue of an undoubted confession."

And, all praise be to Allah, the Lord of the Worlds.

Finally, gentle reader, here is an abstract of the Islamic jurisprudence between your hands, and I seek Allah's Forgiveness for whatever mistakes or defects may be herein. I also invoke Allah to grant us all benefit from whatever sound matters are in it, and to guide us all to the useful knowledge and righteous deeds.

Endnotes

1 See "*Al-Ikhtiyârât*" (p. 527).

2 Al-Hâfiz Ibn Hajar said, "It has no origin in the *Sunnah*. Besides, its meaning is not considered totally correct." See Al-Sakhâwî's book "*Al-Maqâsid Al-Hasanah*" (1311) and Al-`Ajlûnî's book "*Kashf Al-Khafâ'*" (2/511). See also "*Al-Asrâr Al-Marfû`ah*" by Mullâ `Alî Al-Qârî (383).

3 Muslim (4406) [6/198].

APPENDICES

GLOSSARY

NOTE: For easier search for the terms beginning with "Al-" "Ar-" "Ad-" "As-" etc. omit them, as they are in Arabic equivalents to the article "the". For example, a term like As-Safâ will be found under letter "S", and Al-Wasîlah under letter "W".

A

Al-Amânah — *Al-Amânah*, in Arabic, carries the meanings of honesty, trust, and obedience. It can also, in this context, refer to the obligatory acts of worship ordained by Allah, such as Prayer, Fasting, *Hajj* (Pilgrimage), etc.

The *Ansâr* — The Medinian Helpers; the inhabitants of Medina who had accepted Islam and supported the Prophet (PBUH) and all the *Muhâjirûn* (the Emigrants) upon their arrival at Medina.

'Âriyah — *'Âriyah* as a permission for benefiting from an article whose use is permissible, and then the borrowed article remains until it is returned to its owner.

'Awl — An increase in the number of shares of inheritance and a decrease in their amounts according to the deserving parties.

B

Bilqîs — The Queen of Sheba (a place in Yemen); she ruled during the lifetime of Prophet Sulaymân (Solomon), and she and her people used to worship the sun.

C

Collective duty — A religious duty which if sufficiently fulfilled by some Muslims, the rest will not be accountable for it as an obligation, and it becomes an act of the *Sunnah* for them.

D

Dhimmî — A non-Muslim living in and under the protection of a Muslim state.

Dinar — An old Arab coin that equals 4.25 grams of gold.

Dirham (of silver)	A dirham of silver equals 2.975 grams of silver.
Diyah	*Diyah* in Arabic means a compensation payment for a murder or an injury; it mainly means "blood money", and it can also mean "indemnity".

F

Faqih	A scholar of Islamic Jurisprudence.
Fatwa	A legal opinion issued by a *mufti* [a Muslim scholar specialized in issuing legal rulings] in response to a question on a point of the Islamic Law.
The Five Compilers of *Hadith*	They are Ahmad, Abû Dâwûd, At-Tirmidhî, An-Nasâ'î, and Ibn Mâjah.

G

Gharib (Unfamiliar) *hadith*	A *hadith* reported by just one narrator at even one stage of the chain of transmission.

H

***Hasâh* (stone) selling**	A way of selling used to be practiced before Islam; it means that when the buyer throws a stone at a certain commodity displayed for sale, he has to buy it at the price decided by the seller.
Hasan* (good) *hadith	It is a *hadith* whose chain of transmission is linked to the narration of an authority with weak exactitude, and the *hadith* is free from eccentricity or blemish.
Hawâlah	The transference of a debt from the liability of the debtor to the liability of another person.
Hejaz (also Hijâz)	A region of northwest Saudi Arabia on the Gulf of Aqaba and the Red Sea. It includes the sacred cities of Mecca and Medina.
Hijrah	The Prophet's Immigration to Medina.

I

Ijârah	*Ijârah* is defined as follows: a lease for a lawful identified use of either an identified present or described anticipated thing, for a specified purpose and for a known period of time, or (a hiring agreement) for the performance of a certain service in return for a specified compensation.

***Ijtihâd* (legal reasoning and discretion)** An independent judgment in a legal question, based on the interpretation and application of the Four Foundations: the Qur'ân, the Prophet's *Sunnah*, Consensus of scholars and Analogical Deduction.

Ilâ' The potent husband's oath not to have sexual intercourse with his wife for a certain period, this period is specified by four months or more.

***Imâm* (in prayer)** The *imâm* is the one who leads the congregational prayer.

'Înah A usurious kind of transaction in which a seller sells a commodity on credit to a buyer and then buys it from him at the same time at a lower price. For example, a trader sells a car for twenty thousand pounds on credit then buys it from the same man (who has just bought it) for fifteen thousand pounds cash. Thus, the original buyer owes the seller twenty thousand pounds to be paid at the due time.

***'Inân* (cooperative) partnership** It refers to the equivalence between the two partners, in both capital and labor; they equally participate in the business.

Individual duty A religious duty whose obligation extends to every Muslim.

Istihâdah Vaginal bleeding other than menstruation.

J

Jallâlah A term referring to animals that eat impurities.

Jihâd Fighting in the Cause of Allah

Jizyah A tribute or a tax required of non-Muslims living in an Islamic state exempting them from military service and entitling them to the protection of the Islamic state. Concurrently, *Zakâh* is not taken from them, being an obligation only upon Muslims.

K

Kalâlah A case related to the rulings on inheritance; in this case the deceasd leaves neither descendants nor ascendants (as heirs).

The Kharijites (Al-Khawârij, i.e. the Seceders) An Islamic radical sect who broke away from the reign of 'Alî Ibn Abû Tâlib, the Muslim Caliph then, and murdered him. Their followers believe that the Muslim who commits a major sin is a disbeliever. They also curse and revile the Prophet's Companions and deem the blood of Muslims violable.

L

The Lawgiver	The Lawgiver of *Shari'ah* (Islamic Law) is Allah, Exalted be He; the term can also refer to the Prophet (PBUH) as he never ordained but what was revealed to him by Allah.
Luqatah	*Luqatah* refers to any lost property, excluding animals, found by someone.

M

Manihah	The word *manihah* in Arabic indicates something gifted to be made use of then returned to its owner.
Marfû'* (traceable) *hadith	It is whatever word, deed, approval or attribute, traced directly back to the Prophet (PBUH) with a connected or disconnected chain of transmission.
Mithqâl	A standard measure that equals 4.25 grams
***Mudârabah* (speculative) partnership**	Juristically, *mudârabah* (speculative) partnership means giving a certain amount of money to others in order to trade with it in return for a share in the profit.
***Muhallil* (in contests)**	A non-contestant who shares in case of profit and does not share in case of loss.
***Muhallil* (in marriage)**	The one who marries a woman who has been irrevocably divorced three times to make her lawful for her ex-husband to remarry.
Muhallal-lahu	The ex-husband of the woman whom he has irrevocably divorced (i.e. he divorced her three times) and seeks remarrying her through *muhallil* marriage which is unlawful.
Muhrim	The one in a state of ritual consecration for *Hajj* (Pilgrimage) or *'Umrah* (Lesser Pilgrimage).
Muhsan	One in a state of *ihsân*, i.e. in a state of fortification against illegal sexual intercourse and immorality by virtue of valid (current or previous) marriage.

Mulâmasah A way of selling used to be practiced before Islam; it means that when the buyer touches something displayed for sale, he has to buy it at the price decided by the seller.

Munâsakhah It refers to the process of re-dividing the estate in case a legal heir dies before the division of the inheritance of the first deceased. In such a case, the inheritance is to be re-divided taking into consideration the death of that legal heir.

Munâbadhah A way of selling used to be practiced before Islam; it means that when the buyer throws something to the seller, the buyer has to buy it at the price decided by the seller.

Musâqâh *Musâqâh* is defined as giving planted or unplanted trees along with a piece of land to someone to plant them therein, water them, and perform the necessary work until they bear fruit. The farmer then is to be given a specified share of the fruits of these trees, from an unspecified part of the land, while the rest goes to their owner.

Mustahâdah A woman in a state of *istihâdah* (i.e. a woman having vaginal bleeding other than menstruation).

Mutawâtir* (continuously recurrent) *hadith It is a *hadith* reported by a large number of narrators whose agreement upon telling a lie is inconceivable (this condition must be met in the entire chain from the beginning to the end).

Muzâra'ah *Muzâra'ah* is defined as giving a land to someone to cultivate or giving a land along with some seeds to someone to plant them therein and take care of the plantation in return for a specified portion of the harvest, from an unspecified part of the land, while the rest is for the landowner.

N

Najsh An illegal transaction based on a trick through which the buyer is deceived and ensnared by the artificial outbidding of a fake buyer.

***Nisâb* (in theft)** As far as theft is concerned, the *nisâb* refers to the minimum amount of property stealing which entails executing the prescribed punishment, namely cutting off the thief's hand.

Q

Qiblah	The direction of prayer, namely towards the Ka'bah

R

Radd	It is the distribution of the remaining portion of estate among the prescribed heirs. To illustrate, if something remains of the estate after the prescribed heirs take their shares, and there is no agnate heir to take over the remaining portion, this portion is to be redistributed among the prescribed heirs, each according to his share.
The Râfidah	A *Shiite* group who refused the caliphates of Abû Bakr As-Siddîq and 'Umar Ibnul-Khattâb and waged accusations against them and against many of the Prophet's Companions as well.
Ribâ	A term that includes usury and usurious gain and interest.
Ribal-fadl (excess usury)	The selling of an item for another of the same type, on the spot, but in excess.
Riban-nasi'ah (delay usury)	Conditional excess for delay of payment.

S

Sâ'	A standard measure that equals 2172 grams.
Sahîh (authentic) *hadîth*	It is a *hadîth* whose chain of transmission has been transmitted by truly pious persons who have been known for their uprightness and exactitude; such a *hadîth* is free from eccentricity and blemish.
Salam	The *salam* is payment in advance with delaying the receipt of the sold item.
Saqar	One of the gates or layers of the Hellfire.
Ash-Shâm	The Levant; the region covering Syria, Lebanon, Jordan, and Palestine.

Shighâr	It is the type of marriage in which a guardian gives his daughter (or a woman under his guardianship) in marriage to another person on the condition that the other gives him his daughter (or a woman under his guardianship) in marriage too, and without any dowry paid by either.
The *Sunan*	The *Sunan* refers to compilations of the Prophetic *hadiths* classified according to the Islamic jurisprudential subjects; the main four compilers of the *Sunan* are Abû Dâwûd, Ibn Mâjah, At-Tirmidhi and An-Nasâ'i.
Sunni **(adj)**	According to the *Sunnah* (Prophetic Tradition).

T

The Two *Sahihs*	The Two Authentic Books of Al-Bukhâri and Muslim.
The Two Testifications of Faith	Saying, "I testify that there is no deity but Allah and that Muhammad is the Messenger of Allah."

U

Ûqiyyah	An *ûqiyyah* equals forty dirhams of silver, i.e. 119 grams of silver (as a dirham of silver equals 2.975 grams of silver).

W

Wakâlah	In Islamic terminology, *wakâlah* (commissioning) refers to the act in which a legally accountable person appoints another legally accountable person to act on his behalf in a certain matter in which such authorization is permissible.
Walâ'	The freed slave's loyalty by virtue of emancipation.
Wasq	A standard measure that equals 130320 grams.
Waqf	Endowment.
Witr **Prayer**	A supererogatory prayer consisting of an odd number of *rak'ahs* (one, three, five, seven, nine, eleven or thirteen) and it is performed any time between the *'Ishâ'* (Night) and the *Fajr* (Dawn) Prayers.

Z

Zakâh — *Zakâh* is an annual expenditure for the benefit of the Muslim community, primarily to help the poor, required from those Muslims who have excess wealth. Paying *Zakâh* is one of the five main pillars of Islam (for more elaboration, refer to the chapter on *Zakâh*).

Zihâr — *Zihâr* is the saying of a husband to his wife, when he wants to abstain from having sex with her, "(Sexually,) you are to me like the back of my mother," i.e. unlawful to approach sexually. That was a type of divorce practiced by Arabs in the Pre-Islamic Period of Ignorance (*Jâhiliyyah*).

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-A-

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Sura 4 : An-Nisâ'

HADÎTH INDEX

TRANSLITERATION SYSTEM

Arabic Character	Symbol	Example		Arabic Character	Symbol	Example
ء/أ	a/'	amen/`ishâ'		ف	f	faith/fatwa
ب	b	bad/Bilâl		ق	q	Qurâ'n
ت	t	tap/tasmiyah		ك	k	kill/Ka`bah
ث	th	think/thaqîf		ل	l	qiblah
ج	j	Jew/janâbah		م	m	man/marwah
ح	h	Mus̲ammad		ن	n	Noah/nasî'ah
خ	kh	Al-Bukhârî		هـ	h	has/hilâl
د	d	day/diyah		ة	h/t	zakâh/ zakâtul-fitr
ذ	dh	Dhul-H̲ijjah		و	w	way/witr
ر	r	far/ribâ		ي	y	yard/talbiyah
ز	z	zero/zayd		ـَ	a	fad̲l
س	s	say/sura		ـِ	i	fiqh
ش	sh	show/`ishâ'		ـُ	u	sunnah
ص	s̲	`As̲r		ـا/ا	â	Âdam/siwâk
ض	d̲	ifâd̲ah		ـُو	û	Dâwûd
ط	t̲	t̲awâf		ـِي	î	h̲adîth/h̲anafî
ظ	z̲	z̲uhr		ـَوْ	aw	await/`awrah
ع	`	rak`ah		ـَيْ	ay	ayman
غ	gh	maghrib				